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(36,566)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 12

RAFAEL CORTES, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF VICTOR MANUEL SANTIAGO, DECEASED, PETITIONER,

vs.

BALTIMORE INSULAR LINE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

RAFAEL CORTES, as Administrator of the Goods, Chattels, and Credits of Victor Manuel Santiago, Deceased, Plaintiff,

against

BALTIMORE INSULAR LINE, INC., Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 26th day of December, A. D. 1928.

Alex. Gilchrist, Jr., Clerk. Jesse L. Rosenberg, Plaintiff's Attorney. Office & P. O. address: 15 Park Row, Borough of Manhattan, City of New York.

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

The plaintiff above named, complaining of the defendant, alleges upon information and belief:

I. That on or about the 15th day of November, 1928, Rafael Cortes, the plaintiff herein, a resident of the

Borough of Brooklyn, County of Kings, State of New York, was appointed Administrator of the goods, chattels and credits of Victor Manuel Santiago, Deceased, who died intestate on or about the 23rd day of October, 1928, leaving surviving Baldomero Santiago, his father, and Carmen Santiago, his mother, and that said father and mother were at the time of the death of Victor Manuel Santiago dependent upon him for their support and maintenance, and are all his next and only next of kin, that limited letters of administration were duly issued to the plaintiff by the Surrogate of the County of Kings, and that he duly qualified as such administrator and is still acting as such.

[fol. 3] II. That at all of the times hereinafter mentioned, the above named defendant was and still is a corporation organized and existing under and by virtue of the laws of the State of Maryland, and that said defendant has an office for the regular transaction of business in the Borough of Manhattan, City of New York.

III. That at all of the times hereinafter mentioned, the defendant was the owner or leased a certain steamship known as the "Delisle".

IV. That at all of the times hereinafter mentioned, the defendant operated and controlled a certain steamship known as the "Delisle".

V. That at all of the times hereinafter mentioned, the above named steamship "Delisle" was employed as a merchant vessel.

VI. That at all of the times hereinafter mentioned, the decedent was in the employ of the above named defendant on board the steamship "Delisle" in the capacity of a Seaman.

VII. That on or about the 10th day of October, 1928, the said vessel departed from the port of the City of New York bound to the port of Boca Grande, Florida. That when said vessel was moored in the said port of Boca Grande, decedent became ill and took to his bunk. That after taking to his bunk decedent became seriously and dangerously ill and remained in that condition for several days, and during said time he was not given any medical care or attention. That meanwhile said vessel left said port and proceeded

along the coast of Florida, and said vessel passed several [fol. 4] vessels from whom assistance for the decedent could have been obtained, but the officers of said vessel failed to do anything to so assist the decedent. That the quarters in which decedent remained were dangerously cold for anyone who was critically ill as was the decedent, and the heating apparatus was defective and no heat was provided for the quarters in which the decedent was lying dangerously ill as aforesaid. That said quarters were filthy and unsanitary and decedent's bedding was not properly attended to while he was so dangerously ill and he was not provided with sufficient bedding to keep himself warm. That defendant failed to place and keep the decedent in the hospital room on said vessel during said time. That during the time decedent was ill as aforesaid, he was provided with insufficient and improper food. That when said vessel dropped anchor off Sandy Hook, New Jersey, which was the first stop from Boca Grande, Florida, no steps were taken to provide the decedent with medical care and attention although he was in great need of same and although he had been seriously and dangerously ill for several days prior thereto. That the vessel left Sandy Hook, New Jersey and arrived in Carteret, New Jersey, on the following morning and even then no proper attention or care was given to the decedent although he lay dangerously and seriously ill and was about to die. That on the same day in the latter part of the afternoon an ambulance arrived from a hospital and took the decedent to a hospital. That on the following day decedent died.

VIII. That the death of the decedent as aforesaid resulted through the carelessness, recklessness and negligence of [fol. 5] the defendant who was under a duty to furnish the decedent with proper attention, treatment and care and failed to do so, and who negligently, carelessly and recklessly allowed the decedent to meet with his death as aforesaid.

IX. That solely by reason of the negligence of the defendant as above set forth, and without any fault on the part of the decedent, the next of kin of the decedent were damaged in the sum of Fifty thousand ($50,000.00) Dollars.

Wherefore plaintiff demands judgment against the defendant for the sum of Fifty thousand ($50,000.00) Dollars as damages, together with the costs of this action.

Jesse L. Rosenberg, Attorney for Plaintiff. Office & P. O. address: 15 Park Row, Borough of Manhattan, City of New York.

[fol. 6] *Duly sworn to by Jesse L. Rosenberg. Jurat omitted in printing.*

[fol. 7] In United States District Court

[Title omitted]

Stipulation Amending Complaint

It is hereby stipulated by and between the attorneys hereto that at the trial of the action herein it will be admitted by the defendant that the defendant, Baltimore Insular Line, Inc., at all the times mentioned in the complaint herein was and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and that the complaint herein may be amended accordingly.

Dated New York, May 5th, 1930.

Jesse L. Rosenberg, Attorney for Plaintiff. Hunt, Hill & Betts, Attorneys for Defendant.

[fol. 8] In United States District Court

[Title omitted]

Amended Answer

The defendant herein, answering the complaint by its attorneys, Hunt, Hill & Betts, alleges on information and belief as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered "I" of the complaint herein.

Second. It denies the allegations contained in paragraph numbered "II" of the complaint herein.

Third. It admits the allegations contained in paragraphs numbered "III", "IV", "V" and "VI" of the complaint herein.

Fourth. Answering paragraph numbered "VII" of the complaint, defendant admits that the steamship "Delisle" sailed from New York on or about October 10, 1928, bound for the port of Boca Grande, Florida. It denies that when said vessel was moored in the said Port of Boca Grande [fol. 9] decedent became ill and took to his bunk, and alleges that the day after the steamer left Boca Grande for the port of Carteret, New Jersey, and while the said vessel was at sea, the defendant became ill and took to his bunk. It alleges that the decedent was not placed in the hospital room on said vessel during the voyage, because the hospital room is intended for persons suffering from contagious diseases and far removed from the quarters of the crew and where decedent could not have had the care and observation which he had in the seamen's quarters forward. It denies each and every other allegation contained in paragraph numbered "VII" of the complaint.

Fifth. It denies the allegations contained in paragraphs numbered "VIII" and "IX" of the complaint herein.

For a further and separate defense, and repeating all the foregoing allegations, admissions and denials in the first five paragraphs of this answer, defendant alleges:

Sixth. That the decedent's illness and subsequent death were caused or contributed to by the negligence of the decedent in failing and refusing to take the medicines which were prescribed for him on board said vessel, and in failing and refusing to keep his bed-clothing over him during the voyage, and in failing and refusing to keep to his bunk, and in failing and refusing to obey the instructions of the master, officers and steward of said vessel with reference to his diet and conduct during said voyage.

Wherefore this defendant demands judgment against the [fol. 10] plaintiff, dismissing the complaint with costs.

Hunt, Hill & Betts, Attorneys for Defendant. Office & P. O. address: 120 Broadway, Borough of Manhattan, New York City.

Duly sworn to by C. F. Heitmann. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S AMENDED BILL OF PARTICULARS

Plaintiff, for his amended bill of particulars, by his attorney, Jesse L. Rosenberg, Esq., alleges as follows upon information and belief:

1. Decedent contributed to the support and maintenance of Baldomero Santiago, his father, and Carmen Santiago, his mother, approximately the sum of $770.00 for the two years prior to his death, which is calculated in the following manner: $5.00 a week from October, 1926, to April, 1927, and $10.00 a week from April, 1927, to April, 1928, and $20.00 a month thereafter up to the time of his death.

2. Baldomero Santiago is 51 years of age and resides at Salistral Street, Playa Ponce, Porto Rico, and was formerly a cigar maker but is now a laborer. He is at the present time living with Carmen Santiago, his wife, the mother of the deceased.

[fol. 12] 3. Carmen Santiago is 52 years of age and resides with Baldomero Santiago, her husband, at Salistral Street, Playa Ponce, Porto Rico, the father of the deceased. She is a housewife.

4. The plaintiff, administrator, was a half-brother of the deceased. His mother's name is Carmen Santiago and his father's name was Juan Cortez.

5. Decedent was seventeen years of age at the time of his death.

6. The defendant was careless, reckless and negligent and failed in its duty to furnish decedent with proper attention, treatment and care, as alleged in paragraph numbered "VII" of the complaint, and said allegations in paragraph "VII" are the general allegations of negligence upon which the plaintiff will reply on the trial of this action.

Jesse L. Rosenberg, Attorney for Plaintiff, 15 Park Row, Borough of Manhattan, City of New York.

[fol. 13] *Duly sworn to by Jesse L. Rosenberg. Jurat omitted in printing.*

[fol. 14] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

RAFAEL CORTES, as Administrator of the Goods, Chattels, and Credits of Victor Manuel Santiago, Deceased, Plaintiff,

against

BALTIMORE INSULAR LINE, INC., Defendant.

Bill of Exceptions

Before Hon. Robert P. Patterson, J., and a Jury

New York, June 18, 1930.
11:00 o'clock A. M.

APPEARANCES

Jesse L. Rosenberg, Attorney for Plaintiff.
Hunt, Hill & Betts, Attorneys for Defendant (by H. V. Crawford, of Counsel).

A jury was duly impaneled, examined and sworn.

Mr. Rosenberg: In paragraph two of the complaint it is alleged that the defendant is a corporation organized and existing under the Laws of the State of Maryland. It has been conceded by the defendant that that is an error, and that the defendant is a corporation organized under and [fol. 15] by virtue of the Laws of the State of New Jersey; and I ask that the complaint be amended accordingly.

The Court: The motion is granted.

Mr. Rosenberg: I ask that the defendant concede that the deceased was earning $40 per month, with maintenance, on board this ship on which he was before he died.

Mr. Crawford: That is not alleged, but I will concede it, subject to checking the figure.

Mr. Rosenberg: All right. I ask the defendant to concede that the temperature—what the fahrenheit temperature of this man was during the days he was on this ship sick. You may read it into the record.

Mr. Crawford: At 5:45 P. M. October 17, 104 degrees. 12:00 midnight 102 degrees.

7:00 A. M. on October 18, 104 degrees.
7:00 A. M. October 19, 103 degrees.
7:00 A. M. October 20, 103 degrees.
7:00 A. M. October 21, 103 degrees.
8:30 A. M. October 22, 103 degrees.

The Court: What is the range of those temperatures? From 103 to 104?

Mr. Rosenberg: Yes, your Honor, from 103 to 104, and on the 17th at midnight it was 102. The ship left on the 16th.

I will offer in evidence the letters of administration granted to Rafael Cortes, the plaintiff in this case.

Mr. Crawford: No objection.

(Paper marked Plaintiff's Exhibit No. 1.)

[fol. 16] JUAN LOPEZ, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Rosenberg:

Q. Mr. Lopez, were you a seaman on board the steamship "Delisle" in October, 1928?
A. Yes, sir.
Q. What were you? An ordinary or able bodied seaman?
A. I was an A B.
Q. An A B seaman?
A. Yes, sir.
Q. And that means able bodied, is that right?
A. Yes, sir.
Q. Where did you join the ship?
A. I joined the ship in South Brooklyn. I don't remember the pier.
Q. In South Brooklyn, New York?
A. Yes.
Q. And you went with the ship to Florida?
A. To Boca Grande, yes, sir.
Q. And was Victor Manuel Santiago on that ship?
A. Yes, sir.
Q. What was he on that ship?
A. He was an ordinary seaman.

Q. Before you got into Boca Grande did you notice the weather? What kind of weather did you have?

A. We got sometimes cold weather and sometimes——

Q. (Interposing.) I mean was it rainy or dry?

A. Two days before we got to Boca Grande it was raining.

Q. Do you know what day you got to Boca Grande?

A. We arrived on Tuesday.

Q. Was i' October 16, 1928?

A. Yes, sir.

Q. And what time of day?

A. We arrived about seven o'clock, I think, in the morning.

Q. In the morning?

A. Yes.

Q. And what time did you leave Boca Grande?

A. We left after five o'clock.

[fol. 17] The Court: The same day?

The Witness: The same day, yes.

Q. Where did Victor Manuel Santiago sleep on that ship?

A. He slept forward, in the forecastle head.

Q. Is that the forward part of the ship?

A. The forward part of the ship, yes.

Q. And how many sailors were living and sleeping in that part of the ship?

A. Eight sailors.

Q. And were the firemen sleeping in that part of the ship too?

A. They slept on the other side, on the port side.

Q. Was the forecastle head divided into two parts?

A. Into two parts, yes.

Q. And the fireman slept on the port side?

A. On the port side.

Q. And the seamen slept on the starboard side?

A. Yes.

Q. And how are your bunks arranged in that forecastle?

A. Well, our bunks were two—one down and one on top, you see, and the toilet was in front.

Q. There was a toilet in front?

A. In front of the sailors' quarters.

Q. In front of the sailors' quarters?
A. Yes, toilet and bath together.
Q. Does that mean right in the bow of the ship?
A. Yes.
Q. And was there a passageway between the firemen's quarters and the sailors' quarters?
A. Yes, sir.
Q. But it was all under one roof?
A. Yes, sir.
Q. Were there port holes in the sailors' quarters?
A. Two of them, yes.
Q. And where were those two port holes?
A. In the skin of the ship.
[fol. 18] Q. And was there any port hole going into the sailors' quarters toward the well-deck? I mean, looking out into the well-deck from the sailors' quarters, would there be any port hole there?
A. Two in the skin of the ship, and two looking back.
Q. And does that mean two on the stern side of the forecastle quarters, is that right?
A. Yes, sir.
Q. And was there a porthole in the lavatory or not?
A. There was one porthole in the lavatory.
Q. Now, do you remember whether Victor Manuel Santiago took sick on that voyage?
A. Yes, sir, I remember that.
Q. When to your knowledge did Santiago take sick? On what day?
A. Well, on Wednesday, after we left.
Q. What was the condition of his health on Tuesday afternoon when the ship left Boca Grande?
A. On Tuesday he was with a fever, because I touched his face, and it was very hot.
Q. And what about his condition Tuesday evening or Tuesday night?
A. Tuesday night he went to bed, and he was very sick.
Q. What did you observe as to Santiago's condition Wednesday morning? October 17?

The Court: Tell us what you saw.

Q. Yes, just say what you saw?
A. On Wednesday morning he was laying in bed with a great fever. I touched his face, and he had a great fever.

Q. Did you see the first mate of that ship on Wednesday morning?

A. Yes, I saw the mate.

Q. And where did you see him on Wednesday morning?

[fol. 19] A. I saw the first mate on the bridge about seven-thirty in the morning.

Q. And after that did you see the first mate in the forecastle, after that?

A. About a quarter to eight he went to the sailors' quarters—about seven forty-five.

Q. And were you present in the sailors' quarters at that time?

A. Yes, sir, I was present there.

Q. And what did you see or observe at that time with reference to Santiago and the first mate?

A. Well, the mate told him, "I think you are sea-sick; you are a little lazy; you must go to work."

Q. And what did Santiago do?

A. He got up and he went to work, you see.

Q. And how long did he work?

A. He worked to twelve o'clock.

Q. And after that what did Santiago do?

A. He went to bed after twelve o'clock.

Q. And after he went to bed did he ever get up again as far as you know, until the ship arrived in the port of Carteret, New Jersey?

A. He can't get up.

Q. Well, did he get up?

A. No, sir, he didn't get up.

Q. Now, tell us what you observed about Santiago's condition on Wednesday night; that is, on Wednesday afternoon or Wednesday night? That is the day after the ship left Boca Grande.

A. Well, on Wednesday after six o'clock or maybe seven o'clock—I don't remember the exact time—but the third mate went there with a thermometer to take his temperature.

Q. Go ahead.

A. And after he took his temperature, he says, "He got 104 degrees fever," and then I didn't see him coming to the sailors' quarters any more.

[fol. 20] Q. What did you observe yourself as to Santiago's condition on Wednesday evening?

A. He says he feel pains in the chest and the stomach. He called for his mother and father. He was crazy, calling for his mother and father.

Q. Did you notice anything else about his condition that night?

A. Well, that night all the time he called a fellow named "Rosado".

Q. And what else did you notice about his condition that night, that you remember?

A. Well, that night——

Q. (Interposing.) Did you notice anything about his breathing?

A. He was breathing hard, and he had a fever. I touched his face, and it was very hot.

Q. State anything else that you did notice?

A. He was breathing hard, and his lips were blue.

Q. Did you do anything yourself at that time about Santiago? What did you do that Wednesday night?

A. That night?

Q. Yes?

A. Well, after that I went to sleep.

The Court: Did you do anything for him to help him?

The Witness: That night?

The Court: Yes.

The Witness: I can't do anything.

Q. When did you first notice that his lips were blue?

A. Well, Wednesday after the mate came to the sailors' quarters.

Q. Now, tell us about the bedding on the bunk in which Santiago was sleeping?

A. The bedding was completely dirty. He had a blanket and a pillow case.

Q. Did he have a mattress?

A. Yes, sir, an old mattress.

[fol. 21] Q. Did he have any sheets?

A. No, sir, we have no sheets.

Q. Was the blanket a heavy blanket or a light one?

A. It was a heavy blanket, but it was broke.

Q. It was what?

A. It was broke; it was an old one.

Q. Were his bed clothes, as far as you know—in the first place, what time of the day during that trip north were you engaged in your work?

A. I was working from eight o'clock to twelve, and from one o'clock to five o'clock.

Q. And after that you were free?

A. Yes, sir, after that I was off.

Q. After work where did you go and spend the rest of your time?

A. When I got through at five o'clock, I got to take a bath and go to sleep.

Q. Is that in the sailors' quarters?

A. Yes, sir.

Q. Did Santiago have the same bunk during the entire voyage north on this trip?

A. A fellow named Rosado changed bunks with him. His bunk was on the skin side of the ship, and was down.

The Court: When did they change bunks?

The Witness: They changed on Thursday.

The Court: They changed on Thursday?

The Witness: Yes, sir.

Q. Who changed them?

A. Rosado.

Q. Did any of the officers change them?

A. No officers were there.

Q. When you changed him from the bunk on the skin of the ship——

A. (Interposing.) No; on the passageway.

Q. Which passageway was between the firemen's and the [fol. 22] sailors' quarters, is that right?

A. Yes, sir.

Q. On which side of the ship in the forecastle was Santiago sleeping first before you changed him? On the starboard side or port side?

A. He was on the starboard side.

Q. He was on the starboard side?

A. Yes.

Q. And then they took him toward the passageway?

A. Yes, sir.

Q. That is alongside of the bulkhead, which was between the passageway and the sailors' quarters, is that right?

A. Yes, sir, that is right.

Q. And that passageway separated the firemen's quarters from the sailors' quarters?

A. Yes, sir.

Q. In the forward part of the ship?
A. Yes, sir.

The Court: He was moved that day from a bunk on the outside to a bunk toward the middle of the boat, is that right?
The Witness: Yes, sir, toward the middle.

Q. Now, when you moved him did you get any blankets or sheets or a mattress for him?
A. No, sir.
Q. What was the condition of the mattress, the blanket, and the pillow case that he had when you did move him?
A. It was very dirty, because sometimes water from the toilet in the sailors' quarters runs down.
Q. Go ahead.
A. The sailors' quarters were dirty, because the mess-boys never cleaned it, and the lavatory is foul and smells, and sometimes somebody throws paper in that small hole, and the water don't go out, and this water comes into the sailors' quarters, and it was wet all the time there.

[fol. 23] The Court: Who was supposed to clean it out?
The Witness: The sailors were supposed to clean it up, but they don't give the sailors time to clean it. He says he will give time to clean it, but he never does. Sometimes we cleaned it.
The Court: Were you a friend of this man Santiago?
The Witness: I never seen him before. The first time I saw him was when we got on the boat together.
The Court: To go on this trip down to Florida?
The Witness: Yes, sir.
The Court: You saw he was sick later?
The Witness: Yes, sir.
The Court: And did you and the other sailors clean the room out at all, when you saw he was sick?
The Witness: Well, somebody cleaned the room. I see somebody clean the room, but not at other times.
The Court: Some sailors did clean it up after they saw he was sick?
The Witness: Yes, sir, some sailors.

Q. How much of the time on the trip north was the forecastle clean to your knowledge, and how much of the time

was it dirty from this water from the lavatory, that you have talked about?

A. It was dirty all the time.

Q. But you say sometimes it was clean?

A. No, because the water comes again after you dry it.

The Court: The water would come back again?

[fol. 24] The Witness: Yes.

The Court: You say most of the time it was dirty, is that right?

The Witness: Yes, sir.

Q. Tell us exactly where in the lavatory this water came from?

A. Somebody took a bath in the lavatory, and then there is plenty of papers there, and it is a small hole only for the water to go out.

Q. Where is this hole?

A. In the closet.

Q. Running from where?

A. The hole?

Q. Yes?

A. The hole is in the side.

Q. Well, was it in the bulkhead or where was it? Where did the hole run from? From where to where?

A. It ran from the lavatory. That hole ran outside the ship.

Mr. Crawford: A scupper hole?

The Witness: There is an old plate there, with plenty of rust coming out, and the water gets in that way. It is a bad plate.

Q. Well, how far—the toilet was right in front of the sailors' room, is that right?

A. It is not far. There is only a division there.

Q. You mean there is a bulkhead between the lavatory and the sailors' forecastle?

A. Yes.

Q. And where was this hole, or describe where this water ran to from the lavatory? Where did it run to?

A. Well, the water must run outside the ship, before getting into the sailors' quarters, but as soon as the papers get in the hole, the hole gets closed.

Q. You mean that the water was supposed to run outside of the ship?

A. Yes.

[fol. 25] Q. But instead of running outside of the ship, it ran back into the sailors' quarters?

A. Yes, sir.

Q. Now, tell us about the bed clothes? First, tell us who took Santiago to the lavatory when it was necessary for him to go, while he was sick?

A. Well, two sailors took him, one by each hand. The first time after he could not get —, he shit in his bed and pissed there too.

Q. Did he have a bedpan in his bunk?

A. A what?

Q. Did the officers supply Santiago with a bedpan?

A. No, sir.

Q. Did this ship have a wireless on board?

A. Yes, sir, we got wireless.

Q. And when you left Boca Grande what ports, from your own knowledge, did you pass?

A. We passed all the Florida coast.

Q. Now, on Wednesday, October 17, can you remember what ports you were passing at that time?

A. On Wednesday?

Q. Yes.

A. Well, on Wednesday I don't remember, but I saw the lights or saw the shore.

Q. Does that mean Wednesday night?

A. Yes, sir.

Q. Did you see any lights on Wednesday night?

A. Yes, sir.

Q. What do you remember about Thursday with reference to the shore?

A. Well, on Thursday I see—I think it was Miami I seen Thursday.

Q. When did you or about what day was it that you left the shore, that you could not see the shore, that you remember?

A. Oh, about three days after we left Boca Grande, to get to Cape Hatteras.

The Court: How many days was it—one, two, three or how many—before you stopped seeing the lights on the [fol. 26] shore, after you started, do you remember?

The Witness: Well, about three days after we left Boca Grande we don't see the lights on the Florida coast.

The Court: So you think you saw the lights Wednesday night?

The Witness: Yes, sir.

The Court: Tuesday night and Wednesday night and Thursday night?

The Witness: Yes, sir.

The Court: Is that it?

The Witness: Yes, sir.

Q. Now, after Thursday night you went out further away, is that right?

A. Yes, sir.

Q. To sea?

A. Yes, sir.

Q. Now, did you pass any ships as you went north to Carteret?

A. We passed plenty of passenger ships and freight ships, yes.

Q. Could you see them clearly?

A. Oh, sure I could see them.

Q. Now, what was the condition of Santiago on Thursday?

A. Well, on Thursday he was breathing very hard, and called his father and mother and brother. He was like crazy—the same like crazy.

Q. What did you observe about him on Friday night?

A. On Friday night?

Q. I mean on Friday.

A. On Friday night he was just the same.

Q. And what did you observe about him on Saturday?

A. On Saturday?

Q. Yes.

A. On Saturday I see him all the time the same. All the time he was the same.

Q. Now, do you remember when the ship anchored before [fol. 27] she got to Carteret? Do you know what date that was?

A. Well, we anchored that evening at six o'clock, Sunday evening.

Q. That would be Sunday, October 21?

A. The 21st, yes.

The Court: Where did you anchor?
The Witness: In the river.

Q. Well, how far away from Carteret were you when you anchored?
A. It took about one hour to go from the place where we were anchored before we got to Carteret, New Jersey.
Q. Before you got to where?
A. Before we got to Carteret, New Jersey.
Q. To Carteret?
A. Yes. They discharged rock at Carteret, New Jersey.

The Court: You had a cargo of rock that you picked up at Boca Grande?
The Witness: Yes.
The Court: Where is Carteret?
Mr. Rosenberg: Off Staten Island.
The Court: On the New Jersey side?
Mr. Rosenberg: Yes, sir.

Q. Were you in the forecastle at any time while the ship was at anchor?
A. Yes, I was in the forecastle.
Q. And do you know how long the ship was at anchor?
A. The ship was anchored there from Sunday evening until Monday morning.
Q. Until what time Monday morning?
A. About six o'clock Monday we raised the anchor to go to Carteret.
Q. And what time did you get into Carteret?
A. Maybe about seven o'clock or a couple of minutes more. It was about one hour.
[fol. 28] Q. Now, during the time the ship was at anchor were there any other boats around your boat?
A. I see plenty of tugboats passed there.
Q. Did you see the officers of your ship enter the forecastle or do anything for Santiago during the time the ship was at anchor?
A. I don't see the officers there.
Q. Did you see the captain on that day, on Sunday?
A. I saw him on the bridge that day.
Q. You went to the captain, did you?
A. Yes, sir.
Q. Did you tell the captain anything about Santiago at that time?

A. I told him the condition of the man, that he was sick, and he told me "All right," and they were going to send him to the hospital.

Q. And what did you tell the captain at that time?

A. On Sunday?

Q. Yes.

A. I told him, the captain, "This man is very sick, and if you don't send him to the hospital, I think maybe he die, because he is like crazy and calling his father and mother."

Q. And did the captain go with you to the forecastle at that time?

A. No, sir, he didn't go with me.

Q. Well, did he send any officer or anybody to the forecastle at that time?

A. No, sir.

Q. Now, how long after you told the captain about the condition of Santiago was it that Santiago was taken off the steamship "Delisle"?

A. I remember he was taken off after three o'clock on Monday.

Q. That is, the following day?

A. Yes, sir.

Q. Was it three o'clock or later than that?

A. It was later than three o'clock.

[fol. 29] Mr. Rosenberg: It is stipulated that the ambulance from the Marine Hospital met the patient at the ship at 4:20 on Monday, October 22, and that he arrived at the hospital at 5:45 P. M. on Monday, October 22.

Q. Did you ever have occasion to talk with the captain about Santiago's condition before Sunday?

A. Before Sunday?

Q. Yes.

A. Yes, sir, before Sunday one time.

Q. If so, when? What day was it?

A. It was on Thursday, before Sunday.

Q. And what did you tell the captain at that time?

A. Well, I told the captain that this fellow was like crazy, and if he can get some chicken soup for him.

Q. What did the captain do?

A. He said "Tell the mess boy."

Q. Did you see the mess boy go in with chicken soup after that?

A. I never seen him.

Q. Now, during the night time and in the evening after you left work, when you were in the forecastle, what attention, if any, did you see that was given to Santiago while the ship was going north?

A. He was given the attention that the sailors can give him. Only the sailors gave him attention.

Q. Did you see the officers at that time give any attention to Santiago?

A. No, sir.

The Court: Was there any particular sailor who stayed near him all the time?

The Witness: Only the sailors.

The Court: But was there any one particular sailor—— [fol. 30] The Witness (interposing): No, no particular person took care of him.

Q. Did you observe the condition of Santiago before the ship arrived in Boca Grande?

A. No, sir. After he arrived at Boca Grande.

Q. But I mean what did you notice, if anything, before he arrived in Boca Grande? Was Santiago doing his work all right on the boat?

A. He was doing his work all right.

Q. Was he complaining about any trouble or sickness at that time?

A. No, sir.

Q. Did he look healthy or sick at that time?

A. He looked very healthy.

Q. Now, during the trip north was Santiago—were the clothes of Santiago taken off him or not?

A. No, sir.

Q. What clothes did he have on, if you remember?

A. He had his underwear—union suit, and a shirt and pants.

Q. You mean besides his underwear, he had on his pants and a shirt?

A. Yes, sir.

Q. Were his clothes changed during that trip?

A. No, sir, no change.

Q. Did you try to give him something to eat?

A. Plenty of times.

Q. On the trip north?

A. Yes, sir.

Q. Tell us what happened on that trip north when you tried to give him something to eat?

A. We gave him a little bit of coffee or a little bit of soup and bread, and he ate a little bit, and then he vomit again.

Q. Could he hold his food down? A. He could only hold it a little while.

Q. Did you notice anything about whether he was—on [fol. 31] the trip down to Boca Grande was Santiago coughing at all, before you got into Boca Grande?

A. No, sir.

Q. Now, on the trip up what did you notice about him in connection with coughing? That is, on the trip north from Boca Grande?

A. He coughed sometimes.

Q. Was there anything else that you noticed about him besides coughing?

A. And he spit blood sometimes.

Q. Did he spit any blood on the way down to Boca Grande?

A. Not to Boca Grande, no. On the way up north.

Q. What kind of work did he do on his way down to Boca Grande?

A. He was chipping.

Q. What do you mean by "chipping"?

A. Well, chipping with a hammer on the sides, taking off the rust.

Q. Is that easy work or hard work?

A. Well, sometimes it is hard work.

Q. Was he doing his work on the way down?

A. Yes sir.

Q. Was there any physician on this ship at any time on this trip? Was there any doctor on board this ship?

Mr. Crawford: It is stipulated that there was not.

The Foreman of the Jury: Was there a medicine chest on this ship?

The Court: Was there a medicine chest on this boat?

The Witness: I don't see any.

Mr. Rosenberg: We will concede that there was a medicine chest there, but what it contained we do not know.

[fol. 32] A Juror: Was he given any medicine on the ship?

The Witness: No, sir, no medicine was given to him.
The Court: You did not see any given to him?
The Witness: I don't see any.
Mr. Rosenberg: That is all.

Cross-examination.

By Mr. Crawford:

Q. Mr. Lopez, do you remember what work you were doing on Wednesday morning after the ship left Boca Grande?

A. Yes, sir.

Q. What were you doing?

A. After we left Boca Grande?

Q. Yes?

A. Washing paint.

Q. Was Santiago working with you at that time?

A. Yes, sir.

Q. Right alongside of you?

A. Yes, sir.

Q. And if the other seamen who testify say he was not working that morning, but was lying in his bunk, they are mistaken?

A. Yes, he was working until twelve o'clock with me, because I worked with him.

Q. Do you know where Point Jupiter is on the Florida coast?

A. The light there?

Q. Yes?

A. Yes, sir.

Q. That is where vessels going north leave the Florida coast, don't they? Don't you know that is the last light you see when you are bound north toward New York from Florida?

A. I don't know if it is the last light or not.

Q. All right. When was the first time you saw Santiago spitting blood?

A. The first time?

Q. Yes?

A. That was on Wednesday.

[fol. 33] Q. On Wednesday morning?

A. Wednesday afternoon.

Q. Wednesday afternoon?
A. Yes.
Q. And did he do it just once or many times?
A. It was once I see him got sick.
Q. Now, how many times did you see him spitting blood?
A. On Wednesday?
Q. Yes. Was it once or many times?
A. I saw him one or two times spit blood.
Q. Was it any quantity of blood? Did you observe whether he spit considerable blood?
A. Not too much.
Q. Was it red blood?
A. All blood is red to me.
Q. Well, this was red blood, was it?
A. Yes, I think so.
Q. You think so?
A. Yes, all blood is red to me.
Q. You were sure it was blood he was spitting, were you?
A. Yes, sir.
Q. Did you see him spitting blood again on Thursday?
A. Yes, sir.
Q. And on every other day coming up on the ship?
A. On the other days?
Q. Yes.
A. I don't remember the other days for sure.
Q. But it stands out in your memory that you did see him spitting blood after he became sick on Wednesday and on Thursday?
A. On Wednesday and on Thursday too.
Q. And maybe other days?
A. Maybe other days somebody seen him.
Q. Was he coughing on those days too?
A. Yes, sir, he was coughing.
Q. And did the blood come up when he was coughing?
A. Yes, sir.
Q. Now, this Tuesday when you were working down at [fol. 34] Boca Grande was a very hot day, was it not?
A. Yes, sir, it was a hot day on Tuesday.
Q. And you had hot weather from that day on until almost the time you got to New York, did you not?
A. Sir?
Q. You had hot weather every day until just before you got to New York?

A. No, sir, we had cold weather after that.

Q. When do you say it became cold?

A. After—when we arrived at Boca Grande we got hot weather because it is all the time hot there.

Q. Yes, I know.

A. But around Cape Hatteras it was cold.

Q. Did the weather continue warm until you got to Cape Hatteras or off Cape Hatteras?

A. We got cold weather after we got to Cape Hatteras.

Q. Was it very cold then?

A. I feel very cold.

Q. Do you know anything about the degrees of temperature? Do you know how hot it is today?

A. Well, I don't know how many degrees it is today, no.

Q. You don't know that?

A. No.

Q. Was it freezing weather? Do you know what freezing weather is?

A. Yes, sir, I know. It was not freezing, but it was very cold. It was not freezing, because I heard the mate say it is 32 degrees that freeze.

Q. That is right. Did you have freezing weather between Cape Hatteras and New York on this voyage?

A. Something like that.

Q. It was very cold?

A. I feel very cold.

Q. Did that weather last for any time?

A. What is that?

Q. Did that cold weather around 32 degrees last for any period of time at that time? Did it last for one hour or one [fol. 35] day?

A. Until the time we got to New York.

Q. Two days?

A. Yes.

Q. And when you got to New York was it still freezing weather?

A. It was some cold days and some hot days. The weather changed.

Q. Do you remember the weather on that particular Sunday and Monday?

A. When we got in it was not so cold, when we got to New Jersey, but at Cape Hatteras it was very cold.

Q. Is it warmer in the forecastle where you slept or up on the bridge of the ship?

A. It is warmer on the bridge than in the sailors' quarters.

Q. It is warmer on the bridge than it is in the sailors' quarters?

A. Yes, I think it is colder in the sailors' quarters.

Q. You think it is colder in the sailors' quarters than it is on the bridge?

A. Yes.

Q. Before coming into court today had you talked to anybody about your testimony in this case—what you have told about this case?

A. After Santiago died I told his brother. Somebody called me, and said he was his brother.

Q. And you spoke to him?

A. Yes.

Q. Did you talk to anybody about this case yesterday?

A. Yesterday I received a subpœna from the Court.

Q. You received a subpœna from the Court?

A. Yes, sir.

Q. Have you got it with you?

A. Yes, sir, I got it.

Q. Was any money given to you at the same time you got the subpoena?

A. Yes, sir.

Q. How much money?

A. Half a dollar.

Q. Did you talk to anybody about the case at the time you got the subpœna?

A. No, sir.

Q. You did not say a word about it?

A. No, sir.

[fol. 36] Q. Have you ever talked to Mr. Rosenberg, plaintiff's counsel, about this case?

A. Today, yes.

Q. Any other day?

A. Yesterday.

The Court: Did you ever talk to Mr. Rosenburg before today?

The Witness: I came yesterday.

Q. You went to his office yesterday?
A. Yes, sir.
Q. And talked about the case?
A. Yes, sir.
Q. Did you read or did you hear what other seamen had testified to in this case?
A. I don't know what they testified.
Q. You knew, did you not, that two other seamen testified in this case in favor of Santiago about what happened on that ship?
A. I never heard that.
Q. Didn't you know that Rosado had come and told what he knew about the case?
A. I don't know what he testified.
Q. You did not read that over?
A. No.
Q. And no one read it to you?
A. No, sir.
Q. And you are sure of that?
A. Sure, yes.
Q. And did you know that another seaman, by the name of Coto had testified in favor of Santiago in this case?
A. I don't know what he testified.

The Court: Do you know Coto?
The Witness: Yes, sir, I know him.

Q. Well, have you seen either Coto or Rosado since you left this ship?
A. I don't see them.
Q. You have never seen them since you left the ship?
A. I see only Rosado, but I don't know what time it was the last time I seen him.
[fol. 37] Q. Did you talk to him about this case?
A. No, sir, I don't talk about the case.
Q. You say you passed many ships after you left Boca Grande?
A. Yes, sir.
Q. Both passenger ships and freight ships?
A. Yes, sir.
Q. Do you remember whether you passed any ships on Wednesday—passenger ships?
A. On Wednesday?
Q. Yes.

A. I see passenger ships on Wednesday, yes, sir.

Q. Do you know the names of the ships?

A. I don't know the name of the ships. I couldn't see. It was too far away.

Q. How did you know it was a passenger ship?

A. Because a passenger ship has one bridge and more lights.

Q. This was at night that you passed it, was it?

A. In the night time, yes.

Q. Wednesday night?

A. Wednesday night, yes.

Q. When was the next passenger ship you passed?

A. What?

Q. When was the time you saw another passenger ship, if you saw any others?

A. Well, every day we passed ships at all places.

Q. But you do not remember when you passed a passenger ship the next time, do you?

A. We passed plenty of passenger ships every day.

Q. That is just your general recollection, that you would pass them?

A. When we got to Cape Hatteras, we don't see them, but on the Florida coast we see them.

Q. Just on the Florida coast?

A. Yes.

Q. As matter of fact, didn't you leave the Florida coast early Thursday morning, and never see it again or any [fol. 38] other coast until you got to New York?

A. After we left the coast of Florida, the first thing I see was the lookout at Cape Hatteras.

Q. Didn't you leave the Florida coast on Thursday morning? Don't you remember that?

A. I remember three days after we left Boca Grande we left the Florida coast.

Q. You recollect that it took three days before you left the Florida coast?

A. Sure.

Q. You are sure about that?

A. I am sure. Maybe a couple of hours more.

Q. Maybe a couple of hours more?

A. Yes, sure.

Q. You are as sure about that as you are about any of the other facts in this case, to which you have testified?

A. Yes, sir.

Q. Now, you say the weather was hot until you got to Cape Hatteras, is that correct?

A. Yes, sir, it was hot.

Q. It is hot off the Florida coast, is it not?

A. Yes, sir.

Q. All right. Now, during the time you were on the Florida coast, three days as you say, did you wear any blanket over you at night?

A. Yes, sir, I wear a blanket.

Q. Do you wear a blanket over you nights like last night, in this weather? Did you wear a blanket over you last night?

A. No, sir, it was hot last night. I didn't wear no blanket last night.

Q. Did you ever see any of the officers of the ship taking Santiago's temperature?

A. I saw the third mate on Wednesday night.

Q. You saw the third mate on Wednesday night?

A. Yes.

Q. And that is the only time you ever saw any officer take [fol. 39] his temperature?

A. The only time, yes.

Q. Don't you know that broth and soup were specially cooked for this man Santiago on the voyage coming up?

A. No, sir, not specially.

Q. Now, this lavatory or toilet is separated from the sailors' quarters by a bulkhead or wall, is it not?

A. Yes, sir, something like that.

Q. And you say that there was a drain in the lavatory for the water to run out?

A. Yes, sir.

Q. And that that drain was all right except when it got stopped up with paper?

A. Yes, sir.

Q. And this was the sailors' lavatory, was it not?

A. The firemen too.

Q. But it was not used by the officers of the ship?

A. No, sir.

Q. So that if there was any paper that stuffed up that drain or scupper, it was the sailors who put the paper there, and left it there, is not that right?

A. Yes.

Q. Did you ever leave any paper there laying around that lavatory?

A. No, sir.

Q. You always cleaned it up?

A. Yes, sir.

Q. But other sailors did leave it around there in the lavatory?

A. I don't know who left it there, because the firemen were there too.

Q. Is it the officers' duty to clean out the lavatory and toilets?

A. They don't tell the sailors to do it.

Q. It is up to the sailors to clean out their own lavatory and toilet? Isn't that their job?

A. No, sir, that is not the sailors' job.

Q. That is not up to the sailors?

A. No, sir.

Q. Is it not up to the sailors to keep their quarters clean in the forecastle?

A. They don't tell the sailors to do that, when we sign on.

[fol. 40] Q. Do sailors ordinarily take care of their sleeping quarters on ships?

A. No, sir, I don't see the sailors take care of the quarters.

Q. Sailors don't take care of their own quarters?

A. The mess boys.

The Court: Did you have any mess boys on this boat?

The Witness: Yes, sir.

The Court: How many?

The Witness: One mess boy for the sailors, and one for the captain, and one for the officers' mess.

Q. Did that mess boy make the sailors' beds?

A. No, sir.

Q. Are not the sailors supposed to make their own beds?

A. Sure.

Q. And are not the sailors supposed to sweep the floor of the forecastle?

A. No, sir, the mess boy is supposed to sweep the floor.

Q. Did you have any stormy weather coming up on this voyage?

A. No stormy weather.

Q. Did any seas break over the ship on this voyage?

A. Oh, sure, but no storm. That don't mean stormy.

Q. Was there anything wrong with this forecastle, except those several things that you have told us about? Was there anything else wrong about this forecastle that you can mention?

A. No, I mentioned all of them.

Q. You have mentioned everything, have you?

A. Yes.

Q. The roof of the forecastle did not leak, did it? Did the water come down through that roof on this voyage?

A. No, sir.

Q. You are sure about that?

A. Yes, sir.

[fol. 41] Q. So that if Coto says water leaked in through the roof of the forecastle all the time, he is mistaken, is he?

A. Maybe he saw it. I don't know.

Q. You never saw it, did you?

A. No, I don't see it in the roof, no.

Q. You never bothered yourself to take the papers out of this drain in the sailors' toilet, did you?

A. I didn't take the papers out.

Q. You never picked the papers out of the drain so it would work?

A. We are afraid to handle it, because we would get infection.

Q. You just let the papers stay there and block up the drain?

A. The papers got in that hole.

Q. And you didn't do anything about it?

A. Any time you take some papers away, somebody throws some others there. They take a bath, and then the water would stay there.

Mr. Crawford: That is all.

The Court: Is there a bath there?

The Witness: Yes, a bath and toilet.

Redirect examination.

By Mr. Rosenberg:

Q. When the ship was around Cape Hatteras was there any breeze?

A. Yes, sir, it was breezy.
Q. And would your port holes be open at that time?
A. Yes.
Q. And would the breeze go through your portholes? Just answer the question: Would the breeze go through your portholes?
A. Yes, sir.

The Court: The wind?
The Witness: Yes, sir.

Q. Did the firemen use this lavatory besides the seamen?
A. Yes, sir, they used it.
[fol. 42] Q. And they were in different quarters?
A. Different quarters from the sailors, but the same lavatory.

Mr. Rosenberg: That is all.

Recross-examination.

By Mr. Crawford:

Q. This water that you have said accumulated, in the lavatory, all came from the shower-bath, did it?
A. The bath.
Q. It is all bath water, is it?
A. And the toilet, sometimes the pipes are clogged.
Q. The water in this particular case on this voyage came from the bath, did it?
A. The bath and that pipe from the toilet too.

The Court: From the seat?
The Witness: From the seat, yes.

Q. They have a separate drain, don't they, those toilets? Don't you know there is a separate pipe leading overboard from those seats?
A. One of them was broke too.
Q. This water that you say collected on the floor came from the bath?
A. From the pipe and from the bath, too. All the pipes were very old on that ship.
Q. We are talking about the steamer "Delisle" on this particular voyage up from Boca Brande to New York.
A. Yes, sir.

The Court: Were you ever on this boat before that voyage?

The Witness: No, sir, that is the only time.

The Court: Did you make any more voyages on that boat afterwards?

[fol. 43] The Witness: No, sir.

The Court: Just that one voyage?

The Witness: That is all.

Q. Did you ever ask the engineers for steam heat in the forecastle?

A. Myself I went to the chief engineer, yes.

Q. What day?

A. As soon as we got to Cape Hatteras and it was cold, I asked him.

Q. Do you know what day that was?

A. I don't remember the day, you see. I don't remember the day.

Mr. Crawford: That is all.

Redirect examination.

By Mr. Rosenberg:

Q. Was there any steam heat put on in the forecastle during that voyage north?

A. No, sir.

Q. When you say "freezing" do you mean ice or just cold? What do you mean by "freezing"?

A. It was cold.

The Court: Is there a door between the room where the sailors sleep and the lavatory in front?

The Witness: Yes, sir, it is on the side—in a passageway.

The Court: When you got out to the passageway between the firemen's and the sailors' berths, there was the lavatory?

The Witness: Yes, sir.

The Court: Toward the bow of the boat?

The Witness: Yes, sir.

The Court: So the water would have to come through the passageway, and then into the sailors' room?

[fol. 44] The Witness: No, it don't come out the door. It goes in the same place.

Further redirect examination.

By Mr. Rosenberg:

Q. Was there a door leading from the passageway to the deck?

A. Yes.

Q. And was there a door leading from the sailors' forecastle to the passageway?

A. Yes, sir.

Q. And were those doors kept open, or closed all the time?

A. They are open.

Mr. Rosenberg: That is all.

Louis Rodriguez, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Rosenberg:

Q. Mr. Rodriguez, do you remember October, 1928?

A. Yes.

Q. Were you on the steamship "Delisle" at that time?

A. Yes, sir.

Q. What were you on that ship?

A. An A B seaman.

Q. And did you sleep in the forecastle?

A. Yes, sir.

Q. And Santiago was in the forecastle at the same time?

A. Yes, sir.

Q. Do you remember the trip from Boca Grande to Carteret during that month—during October?

A. Yes, sir.

Q. Do you remember the condition of Victor Santiago during that trip?

A. Yes, sir.

[fol. 45] Q. Did you know Victor Santiago before you met him on this ship? A. No, sir.

Q. You slept in the same forecastle with him?

A. Yes, sir.

Q. First, when did you observe he was sick, on what day?

A. He was sick on Tuesday.

Q. And what did you notice about his condition on Tuesday? A. His condition was bad.

Q. Well, on Wednesday what did you notice about him on that day?

A. He was sick, bad—very bad.

Q. Tell us what you noticed about his sickness? What did you notice about him? A. He was in his bunk.

The Court: How did he look?

The Witness: He looked very bad.

The Court: What do you mean by that? Sick?

The Court: I think we will have to have an interpreter.

(Whereupon Joseph Bernet was duly sworn to act as Spanish interpreter.)

By Mr. Rosenberg (through the interpreter):

Q. Will you tell us what you observed about Santiago's condition on Wednesday, the day after the ship left Boca Grande?

A. He was a very sick man.

Q. What did you observe about his condition? A. He told me he was a very sick man. He told me himself.

Q. Did you touch the man yourself?

A. No, sir.

[fol. 46] Q. Did you notice his breathing, how he was breathing? A. Very hard.

Q. Did you notice whether he was hot or cold?

A. I didn't touch him.

Q. What was Santiago doing on the trip from Boca Grande to Carteret? A. He was in bed.

Q. What time did he go to bed on Wednesday?

A. After twelve o'clock.

Q. What did you notice or observe about Santiago while he was in bed? A. He was crying for his mama and papa all the time. He was delirious.

Q. What did you notice about his bedding?

A. It was in very bad condition.

Q. Describe why it was in very bad condition?
A. It was very dirty. He had only one bed sheet, and everything was dirty.
Q. Did he go to the lavatory regularly while he was sick?
A. Two friends of his took him once to the lavatory.
Q. And what happened after that time?
A. He went right to bed again.

The Court: How many men were in the room with him?
The Witness: Eight.
The Court: Were they all Porto Ricans?
The Witness: No, sir.
The Court: How many of them were?
The Witness: I don't remember.
The Court: Well, who were the other men?
The Witness: One from Jamaica, and the others I don't remember.

Q. Did you notice whether or not there was any water in the forecastle during the trip north?
A. There was no water at all.
[fol. 47] Q. Was the floor of the forecastle wet or dry?
A. It was dry. They was taking the water from the sea to wash themselves.
Q. What is that?
A. They were taking the water from the sea to wash themselves.
Q. Was there water in the lavatory?
A. In the lavatory there was no water at all. They had to go to some other place to get some water.
Q. Will you describe the condition of the bunk that Santiago was lying in on the trip north?
A. It was very dirty.
Q. Was there anything else you noticed?
A. He was dirtying the bed himself sometimes. He used to do it in bed.
Q. Well, tell us how it was dirty?
A. There was no change of the linen or anything. They were not changing the bed. They were leaving the bed the way it was.
Q. Did Santiago wear the same clothing or different clothing—when Santiago was lying in his bunk on the trip north was Santiago's clothing taken from him or off him or not?

A. The same clothes he had on.

Q. What watch did you have on the ship?

A. From eight to twelve.

Q. Does that mean you would work from eight to twelve in the morning, and then from eight to twelve in the evening?

A. From eight to twelve days, and from eight to twelve nights.

Q. And after you did your work, where would you go?

A. To my room.

Q. And was that room the sailors' forecastle?

A. For eight sailors.

Q. While you were in your forecastle what did you observe the officers of the ship, including the master, do for Santiago on the trip north?

A. They didn't do anything; nothing at all.

[fol. 48] Q. Now, did it rain at all on the way up?

A. Yes, it was raining.

Q. Did any water get into the forecastle at all while the ship was going north?

A. When it was windy the wind used to blow the water in.

Q. Well, where would it blow the water in to? Into what place or through what place would the water come in?

A. There as a small window there, and the water used to come right in.

Q. How would it come in?

A. There was a broken pipe there, and the water used to come in.

Q. When the water came in, would that make the floor wet or dry?

A. It was wet.

Q. Do you remember the ship before it got in to Carteret, whether it anchored or not?

A. Yes, it anchored.

Q. And how long did it anchor?

A. From six P. M. until six A. M., in the morning.

Q. Well, what morning was that?

A. Monday morning.

Q. Now, during that time what was the condition of Santiago?

A. Asking for mama and papa, all the time, crying.

Q. Were you in the forecastle during any part of that time while the ship was at anchor?

A. I was in the sailors' room.

Q. Do you mean by "the sailors' room" the room where you slept?

A. Yes, sir.

Q. And while you were there did you see any of the officers of the ship in there?

A. No, sir.

Q. Did you observe any boats or ships of any kind around the "Delisle" while the ship was at anchor?

A. Yes, lots of small ships were around—boats.

Q. Well, after you left Boca Grande were you following the coast for awhile?

A. Yes, near the coast all the time.

[fol. 49] Q. For how long?

A. Oh, about two days.

Q. And after you left the coast going north, did you see any ship?

A. Oh, yes, many ships.

Q. And how often? Every day or how often?

A. Almost every day.

Q. Did you have any heat in the forecastle while the ship was going north?

A. No, sir, nothing.

Mr. Rosenberg: That is all.

Cross-examination.

By Mr. Crawford:

Q. It was pretty hot weather going north from Boca Grande to Carteret?

A. Not very much.

Q. Did you sleep every night with a blanket on you?

A. Yes, sir.

Q. Did you sleep with a blanket on last night?

A. Last night?

Q. Yes, wherever you slept last night?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Now, did you observe Victor Santiago spitting blood at any time?

A. When he was coughing he used to spit blood.

Q. And did you see him do that once or many times?

A. Once or twice.

Q. Once or twice a day, or once or twice on the voyage up?

A. While I was there, all the time I was there, once or twice.

Q. Now, was this blood that you noticed reddish in color or brown?

A. Blood, regular blood, red.

Q. Did it have bubbles in it?

A. Yes, something like soap.

Q. Something like soap, frothy?

A. It was kind of a funny color in his mouth, bluish like.

Q. During this voyage up from Boca Grande was Santi-[fol. 50] ago in one bunk all the way up, or did he occupy more than one bunk at different times?

A. He was in one bunk, and they *they* changed him. Rosado changed him to another bunk.

Q. Did Santiago speak any English?

A. With me he spoke Spanish. I don't know.

Q. Did he speak English with anybody on the ship, that you heard?

A. No, sir, not that I know of.

Q. Now, how many days was it so windy that the water blew into the forecastle?

A. Two or three days.

Q. And which days were those, beginning with the time you left Boca Grande on Tuesday night?

A. Thursday and Friday.

Q. And you say at that time that the water came into the portholes on the side of the forecastle?

A. When the wind was blowing, yes.

Q. And was that the only place the water got into the forecastle—through those portholes?

A. And near the toilet was a broken pipe, and it used to come through the door too.

Q. But that was on Thursday and Friday, you say?

A. From the toilet it came almost steady.

.Q Did the sailors used to wipe up the floor or mop up the floor?

A. Sometimes, yes.

Q. Now, did Santiago have a blanket to cover him up?

A. One.

Q. Did he have any sheets on his bed?

A. No, sir.

Q. Did he have a bedspread?

A. No, only one blanket.

Q. Did he have a pillow case?

A. Yes, sir.

Q. Did you ever see the mess boy or the steward or any of the sailors bring Santiago soup or broth at any time?

A. No, sir, only some of us used to bring him things.

[fol. 51] Q. And you want to tell the Court and jury that you never saw this man fed by anybody except when you and the rest of the crew gave him coffee and water, is that right?

A. Yes, sir.

Q. Did you ever see any of the officers of this ship take Santiago's temperature with a thermometer?

A. Twice.

Q. And what day was that?

A. Wednesday about six o'clock, and then again at twelve o'clock. I went with the officer once.

Q. Did you ever see the third officer or any other officer give Santiago medicine?

A. No, sir.

Q. Did you ever ask that heat be turned on in this forecastle—that steam be turned on?

A. Yes, we did.

Q. I asked you if you ever asked to have it turned on?

A. No, sir.

Q. When do you say it began to get cold on this voyage?

A. Before we got to Carteret.

Q. How many days before you got to New York was it cold weather?

A. About two days—a day and a half to two days.

Q. And how cold was it?

A. Very cold.

Q. Was it freezing?

A. No, sir.

Q. Do you know what the degrees of Fahrenheit temperature are, with respect to the air?

A. No, I don't know about that.

Q. You don't know how many degrees are cold wheather, and what the thermometer says when it is hot weather?

A. I don't know anything about that.

Mr. Crawford: That is all.

Redirect examination.

By Mr. Rosenberg:

Q. Did Santiago spit any blood when he was going down to Boca Grande?

A. No, sir, he was working all right.

[fol. 52] Q. And did he cough any while he was going down to Boca Grande?

A. No, sir.

Q. Who asked for heat in the forecastle, if you know?

A. I don't remember. Someone working there.

A Juror: Were there any windows in the portholes?

The Witness: The window was open.

The Court: Was there window glass in it, and open?

The Witness: There was a glass, but it was open.

Recross-examination.

By Mr. Crawford:

Q. You could close those portholes, could you not?

A. They couldn't close it altogether. It would not close altogether.

Q. Did you try to close them at the time the water was coming in, as you have testified?

A. Yes, sir, I did, but I could not.

Q. Were they all just the same way? Were they all the same, or would some of them close, and others not?

A. From the left side they could close them, but not the others.

Q. Do you mean that the ones on the outside of the ship you could close, and the ones that faced in you could not close; is that right?

A. Only those on the right we could not close them. No matter what we done, we could not close them.

Q. Did you tell any of the officers of the ship that you could not close the portholes?

A. No, sir.

Q. How many times did you try to close those portholes?
A. Twice.
[fol. 53] Q. How much water was coming in those portholes when you tried to close them?
A. Plenty of water.
Q. How much water?
A. I don't know exactly how much.
Q. Did it splash in your face when you were trying to close the portholes?
A. No, I was away on the other side. It could not reach me.
Q. Was the water pouring in those portholes when you tried to close them?
A. Yes, sir.
Q. Did you tell any of the rest of the sailors that you tried to close these portholes, and could not do it?
A. No, I didn't tell anyone else. I tried myself to close them.
Q. Where did all this water go to when it went into the forecastle through the portholes?
A. There was a little drain like, and it used to go out.
Q. And did all this water go out that little drain?
A. Yes, sir.
Q. Was it necessary to mop up the floor where this water came in, or did it run out of the drain right away?
A. We did, but sometimes we could not do it, because there was too much water.
Q. Now, this was all clean salt water, was it?
A. But there was lots of water too from the toilet.
Q. I am talking about water that came in through the portholes. Was that clean salt water or not?
A. Yes, sir, that was clean water.
Q. Was there any other place that water came into this forecastle from?
A. From the toilet.
Q. Any other place besides the toilet and the portholes?
A. No, sir.
Q. Did it leak down through the roof above?
A. No, sir.
Q. You are sure about that?
A. Yes, sir.

[fol. 54] JACOB MONTILLA, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Rosenberg:

Q. Mr. Montilla, you remember the trip from Boca Grande to Carteret in October, 1928?

A. Yes, sir.

Q. Do you remember the condition of Santiago on that trip?

A. Yes, sir.

Q. What were you on the ship?

A. I was a cabin boy.

Q. Did you go into the forecastle once a day or more? When you got through with your work, where did you go?

A. I went into the forecastle, into the sailors' room.

Q. And did you see Santiago when you were there?

A. Yes, sir, I see him there.

Q. What did you notice about his condition Tuesday night?

A. Tuesday night?

Q. Yes?

A. His condition Tuesday night, he was very sick with fever, and he was out of his mind, and calling for his mother and father and brother.

Q. And what was his condition after that? What did you observe about him after that?

A. I don't know about Tuesday night, because I went to sleep.

Q. You don't know about Tuesday night?

A. Tuesday night he was out of his mind. He was like crazy, and hollering for his mother and father and somebody else.

Q. When you went in to the forecastle where Santiago was sleeping, what did you notice about his bunk?

A. His bunk was very dirty.

Q. In what way was it dirty?

A. The blanket and pillow case was dirty, and the mat-

[fol. 55] tress and everything was dirty.

Q. During that trip did you see him have any clean bedding at all?

A. No, sir, I never seen clean bedding.

Q. Did you see any officers take care of him on the trip?
A. I never see officers taking care of him, no.
Q. What was your job? What did you do on the ship?
A. I had to serve the captain.
Q. Did you ever see the captain go into the forecastle?
A. No, sir.

The Court: Did you sleep in that same room?
The Witness: No, sir, I slept amidships.
The Court: How many times did you go into the room where the sick man was on the trip up?
The Witness: I go there all the time, at noon time and at supper time.
The Court: Every day?
The Witness: Yes, sir.
The Court: Did you bring him food?
The Witness: Yes, I bring him food—a cup of soup, but he couldn't drink it; he just tasted it. He says he didn't like that kind of soup.

Q. And what day did the ship leave Boca Grande?
A. Tuesday evening at five o'clock.
Q. And when was Santiago sick?
A. Tuesday night.
Q. Tuesday night?
A. He came with the bosun to me and told me to tell the bosun he was very sick, and then I told the bosun the boy is sick, and the bosun say "If he is sick, tell him to go to bed," and then he went to bed.
[fol. 56] Q. That was Tuesday night?
A. Yes, sir.
Q. Do you know whether Santiago worked on Wednesday?
A. I don't know nothing about that. I didn't see him, except after dinner time.
Q. Does that mean after twelve o'clock noon?
A. Yes, sir.
Q. And where was he then?
A. He was in bed.
Q. Was the bosun a Spanish fellow or American?
A. No, he was an American.

Mr. Rosenberg: That is all.

Cross-examination.

By Mr. Crawford:

Q. How many hours or days was the ship out of Boca Grande when you first knew that Santiago was sick?

A. The same day we left.

Q. What time was that?

A. About half past four.

Q. About half past four?

A. Yes, that was the leaving time.

Q. Was he around on deck at that time?

A. He was on deck, to find somebody to tell that he was sick.

Q. Did you take Santiago soup every day?

A. No, sir, just one time.

Q. Just once?

A. Yes, sir.

Q. Do you know who took him his meals the rest of the time?

A. No, sir, I don't know. I never seen that.

Q. When you saw Santiago in the forecastle did you see him spitting blood at any time?

A. He spit some blood, yes, sir.

Q. How many times did you see that?

A. About two or three times when I went into the room.

Q. And you were only in the forecastle an hour or so every day, is that right?

A. What is that?

[fol. 57] Q. How many hours a day would you spend in the forecastle?

A. I went into the forecastle from one o'clock to two o'clock, or three o'clock sometimes, and after supper, after five o'clock or half past five in the evening I would be there until eight or nine o'clock.

Q. So you would spend two or three hours every day in the forecastle?

A. Yes.

Q. How many hours a day did you spend in the forecastle on this trip?

A. I spent about two in the evening, and about three or four in the night time after supper.

Q. Five or six hours a day?

A. Yes, sir.

Q. And during that time every day did you see Santiago spitting blood?

A. Yes, sir.

Q. Several times every day?

A. What is that?

Q. I say, was it several times every day?

A. Yes, sir.

Q. Was this red blood that you saw him spitting?

A. Yes, I saw him spitting blood.

Q. Did this blood that you saw Santiago spitting up have any air bubbles in it, or was it frothy?

A. I didn't see that.

Q. You didn't notice that?

A. No, sir.

Q. Was this a warm voyage or cold voyage coming up from Florida in October to New York?

A. In Florida it was warm.

Q. It was warm in Florida?

A. Yes.

Q. Where do you say it got cold?

A. About two or three days after we left Florida.

Q. Don't you know that you were off the coast of Florida for two days after you left Boca Grande? Is that right?

A. Yes, sir.

Q. Those first two or three days when you say the weather was still hot, did you sleep with a blanket on you?

A. No, sir.

[fol. 58] Q. You did not use a blanket?

A. No, sir. I used it after it got cold.

Q. Do you know anything about degrees of temperature?

A. No, sir. I know when it is cold, but I don't know how many degrees it is.

Q. Was it very cold?

A. Yes, sir.

Q. Was it freezing?

A. I don't know.

Q. Do you know how many degrees are freezing?

A. No, sir.

Q. Did you have the heat turned on in your room at any time on that voyage?

A. No, sir.

Q. Did you ask the chief engineer to put the heat on at any time during that voyage?

A. No, sir, I never asked him, because I don't need it.

Q. You didn't need the heat?
A. No, sir.
Q. It was not that cold?
A. A steam pipe was in my room, crossed my room, and kept my room hot.

Mr. Crawford: That is all.
Mr. Rosenberg: That is all.

(Witness excused.)
(Informal recess.)

CARMEN SANTIAGO, called as a witness by and on behalf of the plaintiff, having been first duly sworn through the interpreter, testified through the interpreter as follows:

Direct examination.

By Mr. Rosenberg (through the interpreter):

Q. Are you the mother of Victor Manuel Santiago?
A. Yes, sir.
Q. Who is his father?
A. Balmoro Santiago.
Q. Is he in court?
A. Yes, sir.

[fol. 59] Mr. Rosenberg: Will you stand up (addressing someone in the court room)?

(Whereupon, a man stood up in the court room.)

Q. Is that the man, with a mustache (indicating)?
A. Yes, sir.
Q. How old were you in October, 1928?
A. Fifty-one years old.
Q. That man is your husband, is not that so (indicating)?
A. Yes, sir.
Q. How old was your husband in October, 1928?
A. Fifty-two.
Q. How old is your husband today?
A. He is fifty-two now.
Q. Then, that means that he was fifty in October, 1928?
A. Yes, he was fifty then, and now he is fifty-two.

Q. How old was your son, Victor Manuel Santiago, when he died?

A. Seventeen years old.

Q. How long had he been away from Porto Rico when he died?

A. Six months.

Q. When did he go to work?

A. In 1928.

Q. And before that——

The Court (interposing): Where do you live now?

The Witness: In Brooklyn.

The Court: When did you come to Brooklyn to live?

The Witness: Three months ago.

The Court: Before that did you live in Porto Rico?

The Witness: Yes.

Q. Now, at what age did Victor Santiago, your son, leave school?

A. Fifteen.

[fol. 60] Q. Does that mean, if he died in 1928, that he left school in 1926?

A. Yes.

The Court: Did he ever send any money home to you?

The Witness: Yes.

The Court: How much?

The Witness: Once ten dollars, and another time fifteen dollars, and another time twenty-five dollars, and again thirty dollars, and again twenty dollars, and again twenty-five dollars.

Q. How long was he away from home?

A. Six months.

Q. And before he left home did he work or not?

A. Yes, sir.

Q. And how much did he earn a week while he was working?

A. Ten dollars a week.

Q. Did he ever work and earn less than that?

A. No, sir.

The Court: What did he do?

The Witness: In a store.

Q. And when he worked in a store what did he do with the money that he earned?

A. He was giving it to me.

The Court: Does your husband work?

The Witness: No, sir.

Q. Did your husband work when he was in Porto Rico?

A. No, he was not working. He is sick. He has got some trouble with his eyes.

Q. How much a week did the amount that you received from Victor Manuel Santiago while he was away, and after [fol. 61] he left Porto Rico, while he was away, average?

A. I don't know exactly how much. I didn't figure it out.

Q. How much do you figure that you received from Santiago from the time he left Porto Rico to the time he died?

A. I don't know. I didn't count it. I didn't figure it out.

Q. How much time elapsed between each time he sent you money?

A. Every month.

Q. Every month?

A. Yes.

Q. How much would the average amount that you would receive a month be?

A. $770.

Q. You don't understand what I mean, evidently. What do you mean by $770?

A. The money that he sent me.

Q. What is the least amount that he would send you in any one month?

A. $10.

Q. Would he sometimes send more?

A. Sometimes $20.

Q. Now, did he ever send you more than $20?

A. The amount I told to the Judge before.

The Court: How many years was he working before he died?

The Witness: One year and a half.

The Court: That was one year in Porto Rico, and six months after he left Porto Rico?

The Witness: Yes.

Q. Did you receive money from him every month from the time he started working until the time of his death?

A. Up to September, 1928, every month.

Q. Before he left Porto Rico, what was the condition of his health?

A. Good.

Q. Did he have any malaria?

A. No, sir.

[fol. 62] Q. Did he have any tuberculosis?

A. No, sir.

Q. Did he have any other sickness?

A. No, sir.

Q. Did you ever see him spit blood?

A. No, sir.

Q. Did he have any continuous cough?

A. No, sir.

The Court: Have you any other children?

The Witness: Yes, sir.

The Court: How many?

The Witness: One in Porto Rico who goes to school there, and one here in court now.

The Court: That one standing up now is your son, is he (indicating)?

The Witness: Yes, sir.

Mr. Rosenberg: That is all.

Cross-examination.

By Mr. Crawford (through the interpreter):

Q. Do you intend to return to Porto Rico after this trial is finished?

A. Yes, sir.

Q. You left your home there, and you intend to go back to it, is that right?

A. Yes, sir.

Q. With your husband?

A. Yes, sir.

Q. Now, during the past two or three years have you been receiving any money from your son, Cortes, who is in court here today?

A. Yes, sir.

Q. And how much money does he send you?

A. Five dollars.

Q. How often does he send you five dollars?

A. About every month or so.

Q. Now, up to the time that your son Victor went away to sea, he was living at home with you, was he not?

A. Yes, sir.

Q. And while he was living with you, you paid for his food and lodging, is that right?

A. Yes, sir.

[fol. 63] Q. During the time your son was working in Porto Rico, you say he turned over to you all of his wages, is that right?

A. Yes, sir.

Q. Now, after he went away to sea he sent you only a part of his wages, is that true?

A. He gave me everything.

Q. You have testified to six amounts that he sent you, when Mr. Rosenberg asked you how much money he sent you. Are those the six amounts that you received during the six months that he was away from home?

A. Yes, sir.

Mr. Crawford: That is all.

Redirect examination.

By Mr. Rosenberg (through the interpreter):

Q. Did your son ever get married?

A. No, sir.

Mr. Rosenberg: That is all.

Mr. Crawford: No further questions.

(Witness excused.)

Mr. Rosenberg: This is the deposition of Dr. Thomas C. Kienzle (reading):

"Thomas C. Kienzle, being duly sworn and examined as a witness for the plaintiff, testified as follows:

"By Mr. Rosenberg:

"Q. Where do you reside, Dr. Kienzle?

"A. 321 Elmore Avenue, Elizabeth, New Jersey.

"Q. Are you about to depart from the vicinity of New York and Elizabeth, New Jersey?

"A. Yes, my vacation starts today.

[fol. 64] "Q. When are you leaving?

"A. Tomorrow morning.

"Q. And where are you proceeding to?

"A. Louisville, Kentucky.

"Q. How long do you intend to be there?

"A. Three weeks.

"Q. Are you a physician duly admitted to practice in the City of New York?

"A. Yes, sir.

"Q. What medical institutions did you go to before being admitted to practice?

"A. Graduated from the University of Louisville.

"Q. In what year?

"A. 1926.

"Q. And after that what did you do, in the nature of your profession?

"A. I was admitted to the regular corps of the United States Public Health Service, interned at the United States Marine Hospital, New Orleans.

"Q. And what were you there?

"A. My rank was assistant surgeon in the regular corps.

"Q. After that what did you do in the nature of your profession?

"A. After that I was assigned to Flood Detail work in Arkansas.

"Q. By the United States Government?

"A. By the United States Government.

"Q. When was that?

"A. That was in 1927.

"Q. And how *how* long?

"A. I was there about five months.

"Q. And after that what did you do?

"A. After that I was assigned as quarantine officer at New Orleans.

"Q. How long were you there?

"A. I was there about two months.

"Q. After that what did you do?

"A. After that I was assigned to the United States Coast Guard.

"Q. And what were you in the United States Coast Guard?

[fol. 65] "A. In the United States Coast Guard I was assistant surgeon in charge of a squadron of destroyers and cruisers.

"Q. How long were you there?

"A. About four months.

"Q. And after that?

"A. After that I was assigned to the United States Marine Hospital at Stapleton, Staten Island.

"Q. When was that—during what time, about, you don't have to know exactly.

"A. I was there about 14 months, and I have been in my present location a year, it was 14 months prior to the time I came with the Standard Oil Company of New Jersey.

"Q. Were you in the United States Marine Hospital located at Stapleton, Staten Island, New York, in October, 1928?

"A. Yes, sir.

"Q. When were you first admitted to practice?

"A. Well, as a regular officer in the service, I could practice in any state or country.

"Q. When were you admitted to practice by any state in the United States?

"A. I was first admitted to practice in Kentucky in June, 1926—passed the State Board examinations there in June.

"Q. Have you been admitted to practice, and when, in the State of New York?

"A. I took the State Board examinations in June, 1929, and was admitted to practice August 26, 1929, in the State of New York.

"Q. By whom are you employed now?

"A. By the Standard Oil Company of New Jersey.

"Q. In what capacity?

"A. My duties are to take care of the sick and injured on the tankers arriving at this port.

"Q. How many men do you examine as a physician and surgeon for a certain period—you name the period.

[fol. 66] "A. My work would show about 300 examinations a month on the average, I think.

"Q. Do you participate in those 300 examinations a month yourself?

"A. Yes, sir, do them myself.

"Q. How long have you been employed by the Standard Oil Company of New Jersey?

"A. A year May 21st.

"Q. 1930?

"A. Yes, sir, I went with them May 21st, 1929.

"Q. What was your position in the Marine Hospital at Stapleton, Staten Island?

"A. I held two or three places, at the time of admission of this man I was executive officer.

"Q. You mean by that at the time of the admission of a patient by the name of Victor Manuel Santiago in October, 1928, you were then executive officer in that hospital?

"A. Yes, sir.

"Q. And what do you mean by executive officer?

"A. The executive officer is the assistant of the medical officer in charge.

"Q. And when you went to the hospital, what did you enter as?

"A. I entered as an assistant surgeon, and was assigned to do duty in the surgical ward.

"Q. Now do you remember a patient coming into the Marine Hospital at Staten Island in October, 1928, by the name of Victor Manuel Santiago?

"A. Yes, I do.

"Q. Have you a clinical record of his case before you?

"A. Yes, sir."

Mr. Rosenberg: I ask that that be marked for identification.

The Court: Mark it.

[fol. 67] (Papers marked collectively Plaintiff's Exhibit No. 2 for Identification.)

Mr. Rosenberg (continuing reading):

"Q. Have you a personal recollection of the details relating to the case of Victor Manuel Santiago?

"A. Yes, because the man was delirious and cyanotic upon admission, and was practically dead on admission.

"Q. First testify to what you know about the case?

"A. Well, this case was an outstanding case, at that particular time as chief of the medical service I was interested in cutting down the mortality of pneumonia patients, —and because this man having pneumonia was practically dead when he came in, which naturally would tend to lower our mortality records at our institution.

"Q. How many pneumonia cases would you handle in that institution?

"A. I should say we handled at least 60 to 80 a year on an average.

"Q. And would it be your duty to diagnose and treat and have supervision of the care of such pneumonia patients?

"A. Yes, as executive officer it is my duty to see that every patient in the hospital is properly taken care of.

"Q. Now state all that you know about the case of Victor Manuel Santiago from the time of his arrival at the hospital—from the time you first saw him?

"A. The man was admitted to the hospital by ambulance in a delirious and cyanotic condition. He was unable to give any history at all. Examinations made on the ward on admission, with the internes under my supervision, showed that the man had a definite lobar pneumonia, with consolidation on both sides. Particularly in the lower lobes. The man's temperature was about 35 degrees cen- [fol. 68] tigrade, which is about 104 Fahrenheit. He was gasping for breath and was apparently a very sick man. An attempt was made to notify his relatives at once of his condition, and the prognosis was given as very poor, with expected mortality within 24 hours.

"Q. What time of the day was he admitted?

"A. The best that I can remember was that he was admitted late in the afternoon, as I remember, of course you can't remember all these details with the number of cases going in or out of a place like that.

"Q. Will you describe what lobar pneumonia is?

"A. Lobar pneumonia is a disease with acute inflammation of the lungs and characterized by a consolidation, high temperature, a rapid pulse, rapid respiration, and which terminates by a crisis, usually between the fifth and eleventh day, and caused by the pneumococcus bacillus of Friedlander.

"Q. Did you make this diagnosis yourself?

"A. Yes, all diagnoses are made under the supervision of the medical officer in charge.

"Q. Does that mean that you made the diagnosis yourself?

"A. Yes, the diagnosis has to be confirmed by the medical officer in charge of the ward before they are allowed to stand or be put on the records.

"Q. That means that you confirmed the diagnosis if if someone else made it?

"A. Yes, I went over the case first with the interne and made a diagnosis, the interne was instructed of course to write up the necessary data.

"Q. How did you determine that he had the pneumonia as you have described?

"A. Determined it by signs and symptoms of pneumonia which, in this case, were outstanding, and by examination [fol. 69] of the chest, which showed on percussion a dullness in both lower lobes, and on auscultation, definite pneumonia rales.

"Q. For the purpose of the Judge and jury who are not present, and since the words that you use are technical words, will you explain what auscultation means?

"A. Auscultation means listening with a stethoscope.

"Q. What does rales mean?

"A. Rales are the sounds that you hear, rales are sounds that are heard with the stethoscope in pathological cases, the type of rale depending on the particular type of case.

"Q. This pneumococcus bacillus of Friedlander, tell us about that so that a layman can understand what it is all about.

"A. The pneumococcus bacillus is the positive organism of lobar pneumonia.

"Q. Is it a germ?

"A. It is considered as bacteria of pathological nature—I think I have made an error.

"Q. If you have, it is not too late to correct it.

"A. It is a pneumococcus organism—it is hard to remember all this pathological stuff, I guess you had better strike out 'bacillus' all through—it is pneumococcus, a coccus type of bacillus which causes a typical growth on the blood agar.

"Q. What is your experience in the hospital and otherwise with reference to cures effected in cases of pneumonia?

"A. Well, my experience in cases of pneumonia is that the patient should be sent to the hospital as soon as possible in order to effect a cure. The mortality is often in proportion to the time that you receive the patient. Patients received early at our institutions and able to take the pneumonia serum gave a mortality of about 12 per cent during my stay at the hospital.

[fol. 70] "Q. In other words, if a patient were given reasonably convenient treatment or reasonably soon treatment,

his chance of recovery, from your records in the hospital, would have been about 88 per cent? I mean that would be the deduction from the fact that the mortality would be 12 per cent, is that so or not?

"A. Yes—of course, that is based on statistics of the institution—that is my usual experience, that the sooner you get a patient, naturally the more you can do, if you get him after he is all toxic, and all run down, the chances are much less, if you get the serum into him early you have a much better chance of doing something with him.

"Q. Can you recall any further details regarding this man?

"A. I don't know as I can.

"Q. There is a memorandum of such details made at your direction, isn't that so?

"A. Yes, sir.

"Q. Do you recognize Plaintiff's Exhibit 2 for Identification as such a memorandum?

"A. Yes, it has my initials on as having checked it.

"Q. Does that memorandum refresh your recollection?

"A. Yes, sir.

"Q. Who prepared that memorandum when it was prepared?

"A. Why, the clinical record is prepared by various people in the hospital, including the receiving officer and the interne on the ward, and the various people who come in connection with the case, including nurses, the laboratory staff, etc.

"Q. When was it prepared?

"A. It was prepared at the time of admission, which was 6 P. M. on October 22nd, 1928.

"Q. And do you know the handwriting of the various persons whose handwriting appears on that record?

"A. Yes, I recognize the handwriting of the various ones [fol. 71] who handled this case, including Drs. Leeham and Gates—those are about the main ones.

"Q. Refreshing your recollection of this man's case by looking at that memorandum, will you state what other details you know about this man's case, which you have not testified to?

"A. For one thing, the man was in a highly toxic and delirious state, and was unable to state anything other than that he had been sick for seven days, with fever and pain in

his chest. The clinical temperature on admission was 40 degrees centigrade.

"Q. Which is how much Fahrenheit?

"A. 104 Fahrenheit. The pulse on admission was 120 per minute, and reached 130 per minute during the night.

"Q. What is the normal pulse, Doctor?

"A. The normal pulse is about 72 for a man, a little faster for a female. The respiration upon admission was 36.

"Q. What is normal respiration?

"A. Normal respiration is about 17 or 18 per minute, depending on the type of individual.

"Q. What do you mean by respiration, in layman's terms?

"A. By respiration is meant the number of breaths taken per minute by inhalation and exhalation.

"Q. Continue on.

"A. Examination by Dr. Gates and confirmed by me showed that the man had crepitant rales on the right middle, the right lower and the left lower lobes of the lung, on auscultation. He also had dullness over these areas, on percussion. His breath was rapid, the lips were dry and crusty, and the respirations were grunting.

"Q. What do you mean by grunting?

"A. Labored respiration, the man gasping, trying to get [fol. 72] enough oxygen to breathe by. The clinical impression at that time was lobar pneumonia in the right middle, right lower and left lower lobes.

"Q. Does the record show any signs of tuberculosis in this man?

"A. The man was unable to give any history as to his past in regard to diseases. No evidence of tuberculosis was made out, the treatment being directed at the lobar pneumonia.

"Q. Was there any evidence of malarial fever?

"A. There was no clinical evidence of malarial fever, the man having a definite pneumonia temperature with no periods of remissions or no evidence of chills common in malaria.

"Q. Will you continue.

"A. I think that about covers it, as much as I know—do you want me to go on with the treatment—what was done for the man?

"Q. Describe what treatment was given. By looking at the record, with the aid of the memorandum, does that refresh your recollection as to what treatment was given the man?

"A. I remember definitely the treatment the man was given. He was given oxygen, because of his cyanotic condition.

"Q. What do you mean by a cyanotic condition?

"A. By a cyanotic condition I mean that the man was blue from lack of oxygen in his lungs. He was given stimulants for his heart, because his heart showed a weakness. He was given sponge baths for the temperature, and an effort was made to make the man comfortable by sedatives, by catheterizing the bladder and by rectal enemas.

"Q. When did he die, if you know?

"A. I know definitely the man died within 24 hours, the exact time was October 23, 1928, at 8:45 A. M.

"Q. Is there any other thing that you remember about [fol. 73] the case?

"A. I remember that we were never able to revive the man and everything was done that could be done for him, but the case was apparently hopeless from the start. The prognosis on admission was given as very poor.

"Q. Have you any present recollection of any other thing in this record?

"A. No— other than that I tried to obtain an autopsy from his brother, who was the nearest of kin, and his brother refused same.

"Q. Does the record contain other facts which you know to be correct? Does the memorandum, Plaintiff's Exhibit 2 for Identification, contain other facts which you know to be correct?

"A. I don't recall any, I would have to look through the record to refresh my memory.

"Q. Look at it.

"A. For one thing, it also shows an ambulance record, the hospital having been called at 3——

"Q. Did you have charge of the getting up of the clinical records in that hospital?

"A. Yes, it was my duty to see that all records were properly kept, and it was my duty to check them before they were filed—as my initials on the front show it has been checked."

Mr. Rosenberg: I offer the record in evidence.

(Plaintiff's Exhibit No. 2 for Identification received in evidence.)

Mr. Rosenberg (continuing reading):

"Q. As executive officer of the Marine Hospital at Staten Island, did you have charge of the ambulance service of that hospital?

[fol. 74] "A. That was under my supervision, to see that an ambulance was immediately dispatched for cases.

"Q. What was the practice in your institution at that time when calls were made from outside for ambulances or for an ambulance, from your institution?

"A. The practice of the hospital is that the receiving officer shall make an ambulance record as soon as the call is received, and that the ambulance should be dispatched within three minutes of the call.

"Q. And in October, 1928, was that the practice?

"A. Yes, sir.

"Q. Can you say of your own personal knowledge that your ambulances were dispatched within that time after receiving the call?

"A. Yes, sir.

"Q. In October, 1928?

"A. Yes.

"Q. And were they so dispatched in October, 1928?

"A. Yes, sir, we had two ambulances.

"Q. Of course that wouldn't be true if there were no ambulance available, is that so—what would you do then?

"A. In case both ambulances were out, a private car was dispatched immediately to take the patient into the hospital.

"Q. Where was that private car obtained?

"A. The private car was on the reservation, being the property of the Government.

"Q. Was this an ambulance or a private car that was dispatched in this case?

"A. An ambulance was dispatched in this case.

"Q. Who was the person who had charge of making the records relating to dispatching of ambulances and receiving of patients in ambulances?

"A. The receiving officer.

"Q. What was his name?

"A. Dr. Gerkins.

"Q. Where is he at present?

"A. At the present time Dr. Gerkins is in Chicago, Illinois, having left the service.

[fol. 75] "Q. Can you tell by looking at this record marked Plaintiff's Exhibit 2, what time the call was made for an ambulance in your hospital with respect to Victor Manuel Santiago?

"A. The call was received at 3 P. M. on October 22nd.

"Q. 1928?

"A. 1928—to go to Carteret, New Jersey, near the ferry, on the New Jersey side, to receive a patient named Victor Santiago, off of the SS. 'Delisle'. The call stated that the man was very sick. The time that the patient was reached was 4:20, and the time of arriving at the hospital was 5:45 P. M. The ambulance surgeon in this case was Dr. V. M. Hoge.

"Q. Do you recognize the signature of the person who signed this paper?

"A. Yes, sir.

"Q. Whose signature is it?

"A. The signature is that of Dr. Gerkins.

"Q. That is his signature on the page relating to the calling of the ambulance?

"A. Yes, sir. The signature of the ambulance surgeon Dr. V. M. Hoge is also on the ambulance record.

"Q. Do you know his signature?

"A. Yes, sir.

"Q. Do you know where he is?

"A. No, I don't recall where he is.

"Q. Who were Dr. Leeham and Dr. Gates?

"A. Dr. Leeham at the present time is in the United States Army Medical Corps.

"Q. Where is he located?

"A. I couldn't tell you.

"Q. Do you know where Dr. Gates is located?

"A. Dr. Gates is practicing medicine, I think in Toronto.

"Q. What were they at that time, Dr. Leeham and Dr. Gates?

"A. Dr. Leeham and Dr. Gates were both assigned to the medical wards, under my supervision.

[fol. 76] "Q. You were their superior?

"A. Yes, sir.

"Q. What army rank did you hold at that time?

"A. Well, my rank in the Public Health Service was assistant surgeon in the regular corps, corresponding to first lieutenant in the army.

"Q. You checked up on the work of these doctors?

"A. Yes, sir, it was under my supervision.

"Q. And you checked up on them?

"A. Yes, sir.

"Q. Now what are the first symptoms that appear in the case when a man is developing pneumonia?

"A. Well, the symptoms are not always the same, but usually a pneumonia patient who is developing lobar pneumonia will have a sensation of chills, and he will develop fever, he will possibly have pain in his abdomen, with possible vomiting and later he notices pain in his chest, with a high temperature, parched lips, and if the condition progresses, with symptoms of deliriousness and shortness of breath, due to lack of oxygen. He will also be toxic to some extent, due to the nature of the positive organism, and may possibly show signs of retention of urine, and inability to defecate. I think that is a picture of it—and higher clinical fever, with extreme signs of toxicity, I should say covers it about as well as anything. He will show rapid pulse, rapid respiration, with possible labored respiration—you want just the symptoms?

"Q. Symptoms and signs—also describe the signs.

"A. The signs are what you would find yourself in going over him.

"Q. What would they be, what do you mean by that?

"A. What the doctor would find on examining him, the symptoms are what the patient would know, the signs are what you find yourself.

[fol. 77] "Q. What would the signs be the doctor would find?

"A. On examination, a pneumonia patient will show signs of toxicity even approaching delirium, rapid pulse, rapid respiration, he will show pathological signs in the chest, such as dullness on percussion over the consolidated area and rales according to the extension of the disease, and broncho-vesicular breathing in the areas not consolidated, as compensatory mechanism—that covers it—in other words, the areas consolidated aren't functioning and the other areas have to make up for it.

"Q. Could you tell after seeing Victor Manuel Santiago in the hospital after he was admitted, how long—with reasonable certainty—how long he had had this pneumonia that you found to exist—yes or no?

"A. Yes, I could.

"Q. And tell us then how long you could say with reasonable certainty he had had the pneumonia that you found?

"A. I could state definitely that the man had pneumonia at least four days prior to admission, because of the amount of consolidation found in the lung area. It takes that long for consolidation to form.

"Q. When the temperature is above normal, at what point in the temperature would you say a man's situation is serious?

"A. Any case with a temperature—having a temperature 101 or higher should be considered as seriously ill until his temperature drops back to normal.

"Q. What is the normal temperature?

"A. Normal temperature is 98 6/10 degrees Fahrenheit, 35 degrees centigrade, I mention the centigrade because the Government records all refer to centigrade records.

"Q. How long were you in the Coast Guard Service?

"A. About four months.

[fol. 78] "Q. Assuming a man's temperature on a Coast Guard Service ship would be 103 degrees in temperature, from your experience on such a ship, do you know whether or not a qualified physician would be called to treat him at such a time?

"A. A man with a temperature of 103 that persists, and showing signs of severe illness, should be taken off of the vessel at the nearest port.

"Q. Doctor, assuming that a ship leaves the harbor of Boca Grande, Florida, in October, on a Tuesday, the date being October 16th, 1928, and assuming that the ship leaves in the latter part of the afternoon of that day; and assuming that on the following day a seaman on that ship has a temperature of 104 degrees; assuming on midnight of the following day, that is on the 17th, he has a temperature of 102, and on the following day, that is on the 18th at 8 A. M. in the morning, he has a temperature of 104 degrees Fahrenheit—whenever I say temperature I mean Fahrenheit in all these cases—assuming that to be so, with-

out nothing more, what would you say as to the seriousness of the condition of that man?

"A. I would say that his condition was serious, a temperature of 104 always indicating a serious condition.

"Q. Would a man at that temperature require medical assistance or not?

"A. Yes.

"Q. Would it be dangerous to keep a man on board ship at that temperature, without obtaining medical assistance?

"A. Yes.

"Q. Assuming in addition to that, his stomach bothered him, his bones ached, his head ached—what would those signs or symptoms indicate to you? If you know?

"A. A man with his—in other words, given a case, a [fol. 79] man with a headache and his bones aching him, may indicate a number of diseased conditions.

"Q. Would you say with reasonable certainty that his condition under those circumstances would be dangerous, if he had those symptoms or signs in addition to the fever?

"A. Well, I think one would have to see the case and judge more after going over the particulars of the case.

"Q. Doctor, I am not asking you to diagnose the case under the circumstances, I am just asking you whether that situation would present a dangerous situation as to a human being?

"A. I think you asked if 104 temperature was dangerous, I said it was considered dangerous at any time.

"Q. I think that is enough.

"A. Of course asking any doctor at all—any doctor—a man had a headache and ache in his bones—it may indicate lots of things to him, not particularly pneumonia.

"Q. It would indicate lots of things as to what particular illness he was suffering from.

"A. The high temperature would indicate infection of some kind, which would have to be differentiated from other things.

"Q. That has nothing to do with the question of dangerousness—that is right, isn't it?

"A. That is without regard to general diagnosis.

"Q. Assuming that this same patient at sea on a ship had the fever that I stated before, that is on the 17th 104 degrees, on the 17th midnight 102, on the 18th 104, on the 19th 103, on the 20th 103, on the 21st 103, and in addition to

that the patient was spitting up blood and he was coughing during some of the days, and that his bones ached and his stomach bothered him, what would you say—could you say with reasonable certainty that would indicate to you?

[fol. 80] "A. Those symptoms would indicate to me that the man was pneumonic, especially in view of the high persistent temperature—few diseases giving a high temperature that persists over that period of time, with the symptoms indicated.

"Q. Would tuberculosis show a similar variation or continuation of temperature as I have indicated in this particular case?

"A. Tuberculosis in the incipient stages will show also a temperature with remissions and exacerbations, usually with slight elevation in the afternoon, and possibly a decline even to subnormal in the morning periods.

"Q. What would be true as to tuberculosis when a case is not an incipient case?

"A. In the far advanced cases, where a man develops pneumonia with tuberculosis, it is possible that he may have a more elevated temperature than that just indicated.

"Q. When in the far advanced cases of tuberculosis, does pneumonia always co-exist with tuberculosis?

"A. No, sir.

"Q. When tuberculosis exists by itself, in the advanced stage of tuberculosis, what would the symptoms or signs be?

"A. State that again.

"Q. In the advanced stages of tuberculosis, what would the symptoms or signs be?

"A. The symptoms would be that of a man running a daily temperature, if he is in an active state, with evidence of malnutrition, loss of appetite, loss of strength, and clinical findings in the chest would be that of a pulmonary tuberculosis.

"Q. Can you say from your having examined Victor Manuel Santiago that he did not have tuberculosis?

"A. I did not see any evidence of tuberculosis.

"Q. How does the temperature run in advanced cases of [fol. 81] tuberculosis?

"A. Of course there is tuberculosis and more tuberculosis, there are various types of tuberculosis, it depends upon the part that is involved.

"Q. Is the temperature even or uneven?

"A. In tuberculosis it is more uneven, and it does not reach the elevated—does not go as high as in pneumonic tuberculosis.

"Q. Do the temperatures that I have already stated in my questions to you—does that indicate an incipient or advanced stage of tuberculosis or not?

"A. No, it does not. The nature of the temperature as being high and persistent, is not indicative of tuberculosis.

"Q. Of any kind, incipient or advanced?

"A. Unless the man had a complication of pneumonia with tuberculosis. You see tuberculosis and syphilis, you may find anything and everything, there is no set type of case, they vary a great deal, you can't lay down any general rule, they are two things that anything or everything may happen.

"Q. How does the fever or temperature run in case of malarial fever?

"A. The temperature in malarial fever depends upon the type of infection. In tertian malaria, there is elevation of temperature every three days, followed by chills, and then the temperature is normal in between the periods of fever and chills. In quartian malaria, the temperature and chills are noticed every four days, the man feeling considerably better in between the periods of chills and fever.

"Q. Does that mean that in every case of malaria there are intermittent spells of high temperature or fever and normal temperature?

"A. That is usually the case.

[fol. 82] "Q. You said something about chills and, if I remember your testimony, you said that the absence of chills in the case of Victor Manuel Santiago when he was in your hospital indicated that he did not have malaria, is that so?

"A. Well, a man with pneumonia can have a chill, but in malaria the chills are regular, coming at intermittent periods, along with the temperature.

"Q. So when you said there was an absence of chills in the case of Victor Manuel Santiago when you examined him in the hospital, you meant an absence of intermittent chills?

"A. There was no indication of malaria, he was a typical pneumonic.

"Q. Now what kind of nursing—assuming that this seaman had the temperature that I have already indicated on the dates and at the times that I have suggested, what kind of nursing would be proper during that time?

"A. A man with symptoms as heretofore described should be given very careful nursing, he should be isolated, placed in a room which is well ventilated with cool fresh air and plenty of bedclothes. He should be given special nourishment, such as nourishing liquids, as eggnogs, orange juice, broths and such stuff. He should be given an initial purge, as calomel, and he should be given sedatives to keep him quiet, to conserve his strength and to keep him from throwing the bedclothes off and subjecting him to more chills. He should have a special attendant to stay with him constantly to make him comfortable and to see that he is properly taken care of until he could be taken from the ship.

"Q. What care should be taken of such a man with reference to his going to the lavatory and so on?

"A. A pneumonia patient or a man with a high tem- [fol. 83] perature should not be allowed to get out of bed because of the extreme strain on his heart and his body mechanism, he should be given a bedpan and made to use it. If his bowels did not move daily he should be given an enema, and if necessary he should be catheterized, if his bladder failed to function.

"Q. Would it be proper to give a man in the condition that I have described a purge every day, or regularly?

"A. No, it would be proper to give him a purge as calomel, early in the case, but daily cathartics and laxatives tend to weaken a pneumonia patient.

"Q. What is the effect of weakening the patient?

"A. Well, in pneumonia the main thing is the resistance of the patient and conserving his strength in order to pull him through the period of crisis, by constantly getting up from bed it is a strain on the man's heart, which has to be carefully watched in pneumonia patients.

"Q. From your experience in the Coast Guard Service, do you know anything about the availability of the Coast Guard Service in connection with medical treatment and service between the ports of Florida and the ports of New York and New Jersey?

"A. The Coast Guard is supposed to help any ship in distress or to answer any call involving any man in distress

on a ship, and to place the man in the nearest available Marine Hospital, or nearest available port, if he is seriously sick, such stations are located at Key West, Jacksonville, Fernandina, and a relief station can be found in any city or port of any size in the United States—that is of marine optation—a clinical or medical relief station authorized by the United States Public Health Service.

"Q. Do they do what you have just stated?

[fol. 84] "A. Yes, they do, I have known a number of cases where they were taken off and brought into Key West for instance while I was at the Marine Hospital at Key West. In fact, captains are ordered to report any case to the Treasury Department in which the Coast Guard fails to answer a call.

"Q. Is pneumonia contagious?

"A. Yes.

"Q. In cases of pneumonia is quinine a proper medicine?

"A. Quinine is considered as an antipyritic in lowering temperature, and opinion varies in the medical profession as to whether quinine is better than some of the other antipyritics.

"Q. Assuming that quinine were given to a man in a state of high temperature, that is a temperature ranging from 104 to 103 degrees—at one time 102—for a period say from the 17th of October to the 21st of October, assuming quinine were administered, how often should the quinine be administered to be effective?

"A. Quinine is really more indicated in malaria for temperature than in pneumonia. It is my experience that quinine has little or no effect in pneumonia, because in fact the effort of treatment should not be to lower the temperature too much, since it is supposed to affect the crisis. No effort should *me* made to lower the temperature too rapidly in pneumonia unless the person reaches a stage of hyper pyrexia.

"Q. Which means?

"A. Which means that his temperature is around 106 degrees.

"Q. Assuming the testimony to show that the steward of this vessel gave this sailor who was ill and had this temperature running from 104 to 103 degrees as above indicated—except the 102 degrees temperature, gave him [fol. 85] castor oil in the morning and salts in the after-

noon on the 17th of October, 1928, what effect would that administrating of medicine be?

"A. Too drastic purgation would effect to weaken the patient to some extent.

"Q. Would you say that giving medicine in that manner—that is castor oil in the morning and salts in the afternoon, would that be too drastic purgation or not?

"A. I would not advise it except on the first day of the clinical symptoms.

"Q. If that were continued for more than a day, would it become a dangerous thing to do?

"A. It would be dangerous in that it would weaken the patient to an unnecessary extent.

"Q. Would you prescribe it for the first day?

"A. Personally I prescribe calomel as an initial purge on the first day, and a very mild laxative after that, such as cascara. I would not give salts after the first day. Of course this treatment stuff varies according to your experience, some doctors now may not agree with that.

"Q. What do you mean by that?

"A. My particular line of therapeutics—each doctor has his own particular line of therapeutics from which he gets the best results. What I mean is what I say is not laid down as the best method of treatment, it may vary according to the experience of the doctor.

"Q. Is this treatment that you have stated the best method of treatment in your opinion?

"A. In my opinion it is—of course personally I believe in getting the pneumonia serum into the patient as fast as you can, that is my method.

"Q. Is it necessary to bathe a patient who is sick and whose temperature runs in the manner that I have indicated?

"A. A pneumonia patient should be given an alcohol or sponge bath daily in such a way as not to expose him to [fol. 86] undue chill, I mean by that doing one leg, maybe in an hour do another leg, a little part of body at a time, that makes him more comfortable and keeps him less restless.

"Q. Does any medical authority disagree with that point of view?

"A. I couldn't state as to what all medical authorities agree on.

"Q. In your opinion, is that the safe thing to do?

"A. That is the usual consensus of opinion amongst the leading medical authorities under which I studied.

"Q. From your observation and treatment of Victor Manuel Santiago in the hospital, assuming the following facts: That a ship on which he was seaman left Boca Grande, Florida, on October 16th in the afternoon, and on the following day, the 17th—this is all 1928—he had a temperature of 104 degrees. The following day midnight 102 degrees, on the 18th, 104 degrees, on the 19th, 103 degrees, on the 20th, 103 degrees, on the 21st, 103 degrees; assuming that during this trip he had been coughing and vomiting, that his stomach had troubled him, that his bones ached, that he had a headache and that he was perspiring, and that quinine was administered to him, also castor oil and salts—assuming that to be so, Doctor, could you say with reasonable certainty whether or not this man Santiago was suffering from pneumonia during all of this time?

"A. Yes.

"Q. And was he?

"A. Yes.

"Q. Based on those questions?

"A. Yes, in my opinion he was."

Mr. Crawford (reading):

"Cross-examination.

"By Mr. Crawford:

"Q. This serum treatment in cases of pneumonia that [fol. 87] you spoke of, is that universally given in cases of pneumonia today?

"A. Any physician who understands pneumonia at all recognizes the value of pneumonia serum, in fact statistics show it cuts mortality 33 per cent over a series of thousands of cases.

"Q. But is that universally given in hospitals of the United States?

"A. It is given in the best of them—I can't say as to all of them, I haven't been in them, but it is recognized treatment and given by the United States Public Health Service who control the Hygiene Laboratory who make recommendations to all institutions in regard to the best line of treatment.

"Q. When is that treatment given?

"A. That treatment is given as early as possible after the diagnosis is established.

"Q. And you said that where it was given very early, I think, in the course of the treatment, that approximately only 12 per cent of the pneumonia cases were fatal, is that correct?

"A. That is according to my records *of* while at the United States Marine Hospital.

"Q. How early would you say that serum treatment would have to be given in order to bring it within this class where recoveries are made in 88 per cent of the cases?

"A. I feel it should be given as soon as possible, the sooner the better.

"Q. Within how many days of the beginning of the high fever?

"A. Well, even after the fever is high it is of value but not as much value as early.

"Q. For instance, if a man has had a fever of 104 degrees for a day, do you mean to say that giving of the serum after that time would not have as much value as if given before?

"A. It would be still of very great value, in fact you [fol. 88] may not be able to establish the pneumonia until it is 104 degrees.

"Q. But giving it a day after a man had this 104 degrees temperature would probably not bring it within 88 per cent recovery class, would it?

"A. Within one day would be of great value, yes—if given within one day, in fact it is of value at any time if the patient is able to stand the treatment.

"Q. Now assume for any reason that this serum treatment is not given within a day or two after a case of pneumonia starts, what then in your experience is the mortality rate in pneumonia cases of this general lobar character?

"A. The mortality is in proportion to the length of time in which the serum is injected in the patient.

"Q. Assuming no serum treatment is given at all, what is the mortality in cases of pneumonia?

"A. That depends on the particular type of pneumonia involved.

"Q. Given this particular type in this case, I am not trying to pin you down to exact percentage, you have

given one percentage, I want to know whether it is near 12 or what it is?

"A. This particular type without serum, the pneumonia mortality I would say would be roughly between 30 and 33 per cent with serum—if given early the mortality would be about 12 per cent according to my observations.

"Q. I want you to tell us exactly what limits you put on this early giving of serum, how soon after the illness starts?

"A. I mean by early that the serum should be given before the patient has undergone complete consolidation in his lungs, because the serum prevents the consolidation of the lung tissues.

"Q. Plenty of fresh air is a recognized way of treating [fol. 89] a patient with pneumonia, is it?

"A. Plenty of pure fresh air without drafts is a recognized method of treatment, due to the fact that the patient is unable to get much oxygen, due to his lung involvement, he should be given all the fresh air possible, in fact, on my wards, I always have all windows down from the top, even in severe cold weather.

"Q. Is that true even in damp rainy weather?

"A. Even in damp rainy weather, a man should have plenty of fresh air.

"Q. In other words, it is more important for him to get fresh air than it is to have him free of dampness?

"A. He should be kept dry and well covered, so as not to expose him to cold from drafts.

"Q. What would you recommend in the way of covering for a man with pneumonia where the temperatures in the locality where he is sick average over 80 degrees?

"A. With a temperature of 80 degrees, given a patient with pneumonia, I would recommend that the man be placed between clean sheets, and that one good wool blanket, be placed over him, with a clean counterpane.

"Q. That one blanket would be all sufficient, you think?

"A. If it was a good warm wool blanket, if it was a thin blanket I would recommend two, depending on the particular blankets—the wool.

"Q. This treatment that you outline for pneumonia is the treatment that you prescribe and the treatment that is given in hospitals with which you are familiar and have been connected, isn't that so?

"A. Yes, sir.

"Q. Isn't the spitting of blood a sign of tuberculosis, the coughing up of blood?

[fol. 90] "A. Spitting of red blood in hemorrhage form, but the spitting up of prune juice sputum or blood tinged sputum is more a sign of pneumonia. In tuberculosis the hemorrhage is profuse and usually amounting to two tablespoonsful- or more.

"Q. If you had had an autopsy in this case, could you have determined whether or not this man had had tuberculosis as well as pneumonia?

"A. Yes, by a pathological inspection of the lungs, tuberculosis could be found in the lung tissue.

"Q. And that would be one of the things you would have examined this body for?

"A. It was not indicated in this condition.

"Q. Just answer my question please. And that would be one of the things you would have examined this body for?

"A. Yes, on an autopsy a body is examined for all conditions, including tuberculosis.

"Q. Assuming that Santiago had been spitting blood—coughing up blood before the vessel arrived at Boca Grande, Florida, and before he had any fever or other indications of this disease which you have proclaimed pneumonia, what would that indicate to you as to the presence or absence of tuberculosis?

"A. That would depend on the amount of blood, the color of it and the source from which the blood came would have to be traced to arrive at a definite conclusion, as the blood may possibly have come from the gums, throat or various other places.

"Q. Somebody comes to you as a doctor and tells you they have been coughing or spitting blood, you assume that comes from their lungs, don't you?

"A. If the blood is profuse and frothy in appearance, as though it had been aerated, it is usually from the lungs. If [fol. 91] it is dark and clotted in any great amount, it is usually vomited up from the stomach.

"Q. If a patient comes to you and tells you he has been spitting or coughing up blood, you right away think of tuberculosis, don't you?

"A. That is commonly thought of, yes, sir, in that condition.

"Q. What are the chances of a person suffering from tuberculosis who gets pneumonia, as compared with a non-tubercular patient?

"A. The chances are very much poorer in a tubercular patient.

"Q. You wouldn't expect a ship's officer to know the difference, particularly in its early stages, between pneumonia and malarial fever, would you?

"A. No, I don't think I would. I think, however, that he should, if the man is sick, he should read up and find out, I wouldn't expect him to know offhand, but I see no excuse for his not reading up in the ship's manual.

"Q. You think the average officer could tell by reading a textbook or ship's manual the difference between the fever of pneumonia and other fevers?

"A. Why, the Public Health Service manual is very plain, I think a man by studying the case a little bit could determine that the man had a definite pneumonia, in view of the fact that the patient is delirious and gasping for breath, he should certainly know something is wrong with the lungs.

"Q. You are assuming knowledge on the part of the officer that the patient is delirious and also that he was gasping for breath, is that right?

"A. Yes.

"Q. Now the broth or soups as a food for this man in his condition that has been prescribed are proper in your opinion, are they not?

"A. Yes, sir, as a rule a liquid nourishing diet is better, [fol. 92] especially early. Of course if the man reaches the crisis and is over his crisis, he should be given more—a little heavier type of foods, such as soft custards and even meat—a full diet.

"Q. Was there any pleurisy connected with this pneumonia—this case of pneumonia?

"A. In this case of pneumonia a pleuretic rub was obtained on examination, which indicated that the man had some slight pleurisy beginning with his pneumonia.

"Q. You are convinced that the pleurisy did not anticipate the pneumonia, are you?

"A. It is very common for pleurisy to accompany pneumonia or to be present as a sequela or complication fol-

lowing pneumonia. You see the lung is involved and the pleural lining of the lung naturally becomes involved when it reaches the peripheral of the lung.

"Q. And cases of pleurisy are very closely associated with tubercular cases, are they not?

"A. Any condition affecting the lung is apt to have a pleuretic condition accompanying it.

"Q. You have no knowledge whether this pleuretic condition that you saw sign of existed only beginning with the man's case of pneumonia, or whether it existed before that time?

"A. I couldn't state.

"Q. Barring the giving of serum which you have described, there is very little to do for a pneumonia patient except to carefully nurse him and let the disease run its course, isn't that a fact, Doctor?

"A. Well, of course the value of drugs enters into it, the patient should be given sedatives to quiet them, and should also at times be given stimulants if you feel that their pulse is getting weak. The nursing treatment in pneumonia is of course very important.

[fol. 93] "Q. It is nursing rather than treatment you ordinarily consider as being the doctor's treatment, isn't that so?

"A. No, I wouldn't exactly state that, I mean by nursing carrying out the necessary orders of the doctor with regard to medicines, as well as, you might say, care of the patient.

"Q. Doctor, pneumonia is one of the most serious diseases that people are afflicted with in this country and others, isn't that so?

"A. Yes, and it is one of the most fatal diseases.

"Q. It is recognized as being a disease which causes the death of many thousands of people in the United States every year, isn't that so?

"A. Well, that depends on the typical—on the type of pneumonia, as I say, lobular pneumonia in a patient who is weak and run down may terminate by a condition of lobular pneumonia, but lobar pneumonia is considered as a true pneumonic condition, separated from the terminal pneumonia——

"Q. Let us confine ourselves to lobar pneumonia such as this man had. It is a fact that even when he gets the best

treatment in hospitals and is given this serum that you have described, that 12 per cent of the cases are fatal?

"A. That is about right.

"Q. And if he isn't in position to get this excellent treatment promptly, the percentage of fatality becomes very much greater?

"A. It would be higher, yes.

"Q. So you can't predict in any given case of pneumonia when a patient enters a hospital, that he is going to recover?

"A. I didn't state that any patient would have a 100 per cent chance of recovery, no.

[fol. 94] "Q. And it is possible that even with the best treatment in the world a patient with this disease will die?

"A. It is possible, yes.

"Q. It is not only possible, but in a great percentage of cases it happens, doesn't it?

"A. I wouldn't say in a great percentage of cases, but I would say in my opinion that about 12 per cent.

"Q. 12 per cent in cases of the best treatment, and in cases where treatment is not the best, it must be a great deal larger than that?

"A. It must be larger, yes, sir.

"Q. I want you to tell us exactly what limits you put on this early giving of serum, how soon after the illness starts?

"A. I mean by early that the serum should be given before the patient has undergone complete consolidation in his lungs, because the serum prevents the consolidation of the lung tissues.

"Q. That consolidation is of course one of the fatal factors?

"A. Consolidation means that the lung tissue—means it is hard and friable, in that way no oxygen is allowed to go in or out, thus subjecting the patient to extreme signs of toxicity, due to lack of oxygen.

"Q. Getting at it another way, about how soon does consolidation take place after the disease starts?

"A. This consolidation takes place, according to the medical authorities, takes place about the fourth or fifth day. You see consolidation is the third stage, the patient has to go through two previous stages before he reaches consolidation.

"Q. What are those stages?

"A. Those stages are congestion in the lungs and engorgement, you see the lungs become congested and en-
[fol. 95] gorged, and that material consolidates into a hard friable mass.

"Q. When does consolidation begin?

"A. Consolidation begins about the fourth or fifth day, that is complete consolidation.

"Q. You do not expect that officers on board ship are going to be able to afford all these ramifications of treatment that you have outlined, would you?

"A. I would expect an officer on a ship to be familiar with common symptoms of sickness, and if he wasn't familiar with them, to look them up in some type of manual, and to be guided accordingly.

"Q. I asked you about the treatment that you recommended in cases of pneumonia. I ask you if you would expect on an ordinary freight ship such treatment could be afforded?

"A. I would not expect an officer on a ship to give serum, but I would expect the other treatment to be followed out.

"Q. You would expect him to follow out all the other lines of treatment that you have outlined in your direct examination?

"A. I would expect the other items of medication, with the exception of giving of pneumonia serum on a ship.

"Q. Have you ever been on a ship where they had the facilities to do all the various things that you recommended in this case?

"A. According to marine laws, a ship is required——

"Q. Just answer the question, never mind about marine law. (Repeated.) Have you ever been on a ship where they had the facilities to do all the various things that you recommended in this case?

"A. Yes.

"Q. You have been on a ship where they have had all the means of carrying into effect the various details of
[fol. 96] treatment that you have outlined in your testimony?

"A. I board ships daily where they have such accommodations.

"Q. By the usual expression of a layman without any medical education, when they talk of a man spitting or

coughing blood, in your experience that isn't usually blood from a tooth or the gum, is it?

"A. It often is, people with diseased gums commonly spit blood.

"Q. Doctor, you said that assuming you were aboard a ship treating an ill patient, that if the temperature of 103 persisted that would be a sign of severe illness and the man should be taken off the ship. Now I ask you if the man's temperature was originally 104 degrees, then if after having been treated with a purgative and some quinine his temperature went down within the next 12 hours to 102, if that would not be an indication that the fever, from whatever cause it arose, was abating?

"A. If it dropped from 104 to 102 and still dropped to normal, I would say that it was an indication, but if it went back up again why I should say that the condition should still be considered as being serious.

"Q. But until the temperature went back up again from 102, wouldn't you think as a reasonable man that this fever was running its course?

"A. No, the nature of fever is that it will fluctuate a little bit, a small amount, it doesn't stay at a fast level, it is bound to fluctuate to some extent. However, I wouldn't let the temperature be the sole guide in a case of a man who is sick, I would naturally take into consideration other symptoms and findings.

"Q. This crisis that you mentioned is peculiar to pneumonia, isn't it?

"A. It is peculiar to the type of pneumonia known as [fol. 97] lobar pneumonia, but not lobular pneumonia.

"Re-direct examination.

By Mr. Rosenberg:

"Q. Now, the oil tankers that you spoke of, are they freight ships?

"A. Yes, sir, they carry oil cargoes.

"Q. They don't carry passengers—do they or do they not?

"A. No.

"Q. Assuming that the temperature was 60 degrees Fahrenheit while this seaman was sick on the 21st day of

October, what coverings would you prescribe for him then, Doctor—the outside temperature—and no artificial heat in the forecastle where he was lying?

"A. With a temperature of 60 degrees outside, that is about the same temperature you asked me about. I would recommend—as to how much covering you would put on, would depend on the quality of the covering, I would recommend I should say with a temperature of 60 two warm blankets with sheets and a counterpane.

"Q. And of what material would you have the blankets?

"A. I would have the blankets of wool.

"Q. Now assuming that broth were given to this seaman as you saw him, and he had been fed by the ship right along during his illness, how should the broths have been administered to him?

"A. Why, it should have been given to him by mouth at short intervals of three hours, as much as he would hold, and if the man was too delirious to take it by mouth, he should be given food by rectum.

"Q. Would there be normally any need of an unnatural [fol. 98] way—would the person giving the broth have to give it to him manually or not, in your opinion?

"A. If the patient did not take broth readily and was in a delirious state, he should be fed nourishment by an attendant, in order to keep up his strength.

"Q. How should he be fed?

"A. He should be fed by spoon, if he could take it.

"Q. Should he be compelled to take it or not?

"A. He should be compelled to take nourishing foods because he needs his strength to carry him through the period of crisis.

"Q. Do you know as a matter of fact whether the officers on merchant ships are required to obtain a certain amount of medical knowledge before they obtain a license to act as officers on merchant ships? Do you know that?

"A. To my knowledge, an officer on a ship before receiving his license is required to have a first aid certificate.

"Q. Do you know that to be a fact?

"A. I know that to be a fact, yes, sir, according to maritime laws.

"Q. What does a first aid certificate mean, as a doctor, what do you mean by that?

"A. A first aid certificate includes—and I have given examinations for them and happen to know what it includes—knowledge of the common drugs, their doses and uses, and common knowledge of symptoms of diseases and simple diagnoses, along with first aid in case of injured cases.

"Q. Should a man with fever be allowed to keep his underwear and clothing on at night for many days? Assuming those to be facts in the testimony?

"A. No, he shouldn't, it is a matter of comfort with the pat-ent, a matter of the man sweating, a possible chance of [fol. 99] taking severe chills, also to facilitate the sponge baths and treatment, he should be required to strip and have a clean nightgown.

"Q. After how many days from the first presence of pneumonia fever should an officer recognize the difference between such fever and malarial fever?

"A. Well, after the temperature has been elevated for a period of two or three days, it would indicate that the man was not suffering from malaria.

"Q. If a person suffering from fever is not restrained and kept in bed, will he get out of his bed and go about even in the open air?

"A. He will if he is delirious, a man who is delirious of course will make an effort to get out of bed, may make an effort to fight or do lots of things."

Mr. Crawford: Page 54. (Reading:)

"Q. Could you tell from your observation of Victor Manuel Santiago how long he had been delirious before you saw him?

"A. No, I couldn't state definitely, the fact that he was blue though and cyanotic, I should say he must have been delirious for quite a while, the exact number of days I couldn't state definitely, because some people will become delirious suddenly over night, others may go along with a high temperature quite a while and not become delirious.

"Recross-examination.

"By Mr. Crawford:

"Q. What is the effect on a patient suffering from pneumonia, of smoking cigarettes?

"A. Well, a pneumonia patient shouldn't be allowed to smoke cigarettes, and it is the custom in all hospitals to have the pneumonia wards, the air cleared of any smoke [fol. 100] or any disagreeable odors, the patient should be compelled not to smoke if he tried to.

"Q. The effect is very bad on the patient, isn't it?

"A. Naturally, the lung tissue is pretty well consolidated, he needs all the air and the little bit of lung tissue he has got to inhale, I should say, oxygen.

"Q. Smoking would tend to hinder a patient in getting the oxygen that he needs very badly in this condition, wouldn't it?

"A. Smoking should not be permitted at all in a patient with pneumonia.

"Q. You consider it very dangerous for a patient with pneumonia to smoke?

"A. Not exactly dangerous, but it doesn't help any.

"Q. It actually harms, doesn't it, Doctor?

"A. It does to such extent, I wouldn't say it is a matter of life or death, it shouldn't be allowed, the patient should be restrained, or allow nobody in the ward with a cigarette."

Mr. Rosenberg (reading):

"Q. Can you say from your observation of Mr. Victor Manuel Santiago—that if he had been given proper medical care and treatment, could you say with reasonable certainty that he would have survived?

"A. I can state that with my experience that he would have a possible chance of 88 out of 100 of surviving."

Mr. Crawford (reading):

"Q. That is in case he got immediate and prompt treatment and was given the serum that you have mentioned, isn't it, Doctor?

"A. In case he was given the treatment I outlined previously.

"Q. And that a hospital was available to give him this [fol. 101] treatment within 24 hours after he became ill?

"A. If he should have been taken to a hospital within 24 hours."

Mr. Rosenberg (reading):

"Q. Would you limit it to 24 hours?

"A. Well, I mean early in the disease.

"Q. Would you say, Doctor, that if Victor Manuel Santiago had been given reasonable medical treatment by the officers on board that ship after the 17th of October, 1928, this his chance of surviving would have been greater than his chance of dying?

"A. Yes."

Mr. Rosenberg read from the deposition of Miguel Rosada, as follows:

"MIGUEL ROSADO, being duly sworn, and examined as a witness, testified as follows:

"By Mr. Rosenberg:

"Q. Mr. Rosado, you are a seaman?

"A. Yes, sir.

"Q. Were you an A B seaman in October, 1928?

"A. Yes.

"Q. Well, was Victor Santiago sick when you were ready to leave?

"A. No, sir.

"Q. When was he sick?

"A. He sick in the night time, we leave 12 o'clock in the day time, in the night time he get sick and next day in the morning he can't work and I called the boatswain. I told him that the boy is so sick he can't work, so the boatswain came to the forecastle and saw him. He was laying in the bunk, so the boatswain went and told to the mate, so the [fol. 102] mate come. I see him when the mate come to the forecastle. After I see the mate coming back and I saw the boy after the mate.

"Q. Was there any change of linens or coverings made on your bunks in the forecastle during the whole trip?

"A. No, sir.

"Q. How many times did you see the chief officer in the forecastle after Santiago took sick?

"A. I see the chief officer only one time.

"Q. Only one time?

"A. Yes, when I was in the room.

"Q. What did the chief officer do for Victor Santiago at that time?

"A. The first time he come when I see him—he come look for him for work; after that I didn't see him.

"Q. How many times did you see the third mate there?

"A. I see the third mate two times.

"Q. What did the third mate do each time?

"A. The first time he take a temperature and one—two days—one day before we reach Cape Hatteras he come and take his temperature.

"Q. Did you or did you not see Victor Santiago smoke while he was sick in the forecastle?

"A. No, sir, I didn't see him smoke.

"Q. After the first day out of Boca Grande did you ever see Victor Santiago in the messroom?

"A. No, sir, I didn't see—I didn't see Victor Santiago in the messroom in the whole trip, when we left Boca Grande to New York—I didn't see him.

"Q. Tell us what you saw about him at that time before you reached Point Jupiter?

"A. I saw him. He was crying again. I turned the light off and I look at him. When I saw his bunk it was so dirty and then I say what he want. He say 'I want to go to the toilet.' So I went to take him to the toilet and it was too [fol. 103] late, he do everything in the bunk. And the next day—the next day I got to take him to another bunk with the same clothes because the other bunk was dirty—the steward didn't come and change.

"Q. He moved his bowels in the bunk?

"A. Moved his bowels, yes.

"Q. As far as you know, yes or no—I mean did any of the officers, as far as you know, order the bunk to be cleaned?

"A. Well, I didn't see no officers say nothing about the bunk or clean it.

"Q. Now, this water that came from the toilet—tell us where did this water come from, from the toilet—from what part of the toilet?

"A. This is a pipe of salt water, the water go to the toilet, you know, to clean everything—well, the pipe is broken, leak, and the water come through there underneath—come through the forecastle, it come through the alley too.

"Q. Did you stop the water pipe?
"A. Can't stop.
"Q. Did the engineer try to stop the water pipe?
"A. I didn't see the engineer come and fix it when I was in the forecastle."

Mr. Crawford: Reading from the direct examination of Mr. Rosado:

"Q. Did you ever see more than one blanket on Victor Santiago's bunk?
"A. No, sir, only one blanket and two sheets and one pillowcase.
"Q. Did you see Victor Santiago smoke at all while he was sick in the forecastle—was he smoking?
"A. He buy about six packages of cigarettes and a friend of mine in the ship he took it and put it in the suitcase because the rest told him, 'Don't let him smoke, maybe make him more sick.'"

[fol. 104] Mr. Crawford: Page 39, beginning at the cross examination. (Reading:)

"Q. You say that it was three days after you left Boca Grande when Santiago became worse, is that right?
"A. Yes, sir.
"Q. And after three days out from Boca Grande he was too weak to stand up?
"A. Yes, sir.
"Q. Santiago didn't become sick until the night you left Boca Grande, is that right?
"A. Yes.
"Q. You told Mr. Rosenberg that he became worse after you had been three days out of Boca Grande, is that correct?
"A. Two days after——
"Q. You said three days. Do you want to change it to two days? Which is right?
"A. Three days.
"Q. For three days he was sick but he was not so very sick, is that right?
"A. Yes, sir.
"Q. And then after three days he got worse?
"A. Yes.

"Q. Now, those first three days after you left Boca Grande, coming around past Miami and Palm Beach—those three days he could still stand up on his feet, couldn't he?

"A. Yes.

"Q. Now, those first three days, was he able to go to the toilet himself?

"A. No, sir.

"Q. Did you help him?

"A. Yes, sir.

"Q. Did you help him many times?

"A. Yes, sir.

"Q. How many times—three or four times a day?

"A. Three times.

"Q. Was the weather fine or stormy?

"A. Well, it was not so hot and not so cool, it was more hot than cold.

"Q. And you had the portholes all open, did you?

"A. Yes, sir.

"Q. Was the weather fair or was it stormy?

"A. It was fair.

[fol. 105] "Q. And you didn't have to close the portholes on account of seas coming in, did you?

"A. No, sir.

"Q. You could keep them open all the time and no water came in?

"A. We keep them open until one day before we reached Cape Hatteras.

"Q. And you never got any water in through those portholes, is that right?

"A. No, sir, we got water in the floor but that come from the toilet.

"Q. Water came from the toilet?

"A. Yes, sir, toilet is right across the room.

"Q. Did the sailors mop that water up when it came in?

"A. Yes, the sailors do that, the messboy is supposed to do it but——

"Q. But the sailors did it in this case?

"A. Yes, sir.

"Q. You did it yourself?

"A. Yes, sir.

"Q. Every time you saw water on the floor you mopped it up?

"A. Yes, sir.

"Q. When you changed Santiago's bunk, you got some clean or some new blankets and linen for him?

"A. My was little clean, his was so dirty—he do everything in his bunk, and I changed to mine.

"Q. You changed him to your blankets and your linen?

"A. Yes, sir.

"Q. You got some more for yourself?

"A. No, sir, I stayed without blankets.

"Q. You didn't ask anybody for blankets?

"A. No, sir.

"Q. Did you yourself tell Santiago not to smoke any more?

"A. Yes, sir, I did.

"Q. When you told him that, he was smoking, wasn't he?

"A. No, sir, when we get in Boca Grande he was right, he don't was sick. He get sick. He get sick one day we [fol. 106] left Boca Grande, and he went ashore to buy cigarettes, so I said, 'Don't you smoke, because going to make you sick', so another fellow come—fireman from the forecastle—and took the carton of the cigarettes.

"Q. What was his name?

"A. Coto.

"Q. Did he steal them?

"A. No, he didn't steal it, he kept it for him. He say 'All right, when we get in New York you be all right, I give back to you.'

"Q. Are you sure about that?

"A. Yes, sir.

"Q. If Coto himself says he stole the cigarettes, you think he is mistaken?

"A. No, he didn't steal the cigarettes, because he ask him first and he give it to him.

"Q. You want to swear you never saw Santiago smoke a single cigarette after he left Boca Grande?

"A. Yes, sir, absolutely.

"Q. But in spite of that, you and other sailors warned him not to smoke—that's your story?

"A. Yes.

"Q. Did this man keep his blankets on while you were in the stateroom?

"A. Yes, sir.

"Q. The only water that you saw in the forecastle was this water that you say come in from the toilet and was on the floor?

"A. Yes, sir.

"Q. And that was all the water you ever saw in the forecastle?

"A. Yes, that's the only water.

"Q. And you swear there was no other water at any time in the forecastle?

"A. Yes, sir, I swear.

"Q. No water ever got on your bunk?

"A. No, sir.

"Q. No water ever got on any of the bunks in the forecastle?

"A. No, sir.

"Q. Now, coming up on this voyage from Boca Grande, did you use the blanket that was on your bed—did you [fol. 107] cover yourself up at night?

"A. When we left Boca Grande?

"Q. Yes.

"A. No, sir, it was too hot. We used the blanket one day before we reached Cape Hatteras.

"Q. You were never in the forecastle when food was brought to Santiago—soup——

"A. No, sir.

"Q. You know food was brought to him—you say the messboy brought the soup?

"A. I could see the messboy going forward with the soup.

"Q. How big was this stream of water you say came into the forecastle—was it just a leak from the pipe?

"A. Yes, just a leak.

"Q. A little trickle of water?

"A. Yes, sir.

"Q. And with the mop you could clean it up right away and then it would start again, is that right?

"A. Yes, it would start again and that way every time, every time. It keep the——

"Q. Just made the floor damp?

"A. Make wet, yes, sir.

"Q. There wasn't any great stream of water on the floor, was there?

"A. No, sir.

"Q. You mean that it didn't flow in, it just come in in a trickle, is that right?

"A. Yes, sir.

"Q. Drops?

"A. No, it came run, not drops.

"Q. Came running?

"A. Came running, yes, sir, all the time.

"Q. Was the stream as big as this pencil (indicating)?

"A. No; is more big.

"Q. And you mean to say that water was running in there all during the voyage?

"A. All day, yes. We got to keep a man all the time with the mop.

"Q. How often was that floor mopped—twice a day?

"A. Every five minutes.

"Q. Every five minutes?

"A. Yes, sir.

[fol. 108] "Q. Did you speak to the captain or any of the officers about that?

"A. No, sir, I don't speak."

Mr. Rosenberg reading from the deposition of one Juan Coto (reading):

"JUAN COTO, being duly sworn and examined as a witness for the plaintiff, testified as follows:

"By Mr. Rosenberg:

"Q. How old are you?

"A. 36.

"Q. Were you on the steamship 'Delisle' on a voyage that began in October, 1928?

"A. Yes, sir.

"Q. What position did you have on that ship?

"A. On the first trip I was a wiper——

"Q. And you slept in the firemen's quarters, isn't that so?

"A. Firemen's quarters, yes, sir.

"Q. And your room—that is, the room in which the firemen slept was right across from the room in which the seamen who belonged to the deck force slept, is that right?

"A. Yes.

"Q. When did you notice for the first time that Victor Santiago was sick?

"A. Wednesday morning.

"Q. How did you happen to notice that?

"A. I heard the first mate come in the room.

"Q. Whose room do you mean?

"A. The sailors' rooms.

"Q. First, what time of the day was it?

"A. Abou- half past 8.

"Q. Did you see the first mate do anything for Santiago?

"A. No, sir, never do nothing.

"Q. Tell us what happened at that time?

"A. I heard the first mate come in the room, he say, 'Who that man sick, who the sailor sick?' I heard what he talking, I come up in the sailors' forecastle and another sailor is [fol. 109] stay in the room. He said, 'That man there in the bunk.' And the first mate said—I won't talk what I heard the mate talking, see—he say 'You God damn lazy, get up, you no sick, you seasick, that's what you have.'

"Q. You didn't see the first mate in Santiago's room any more on that trip?

"A. No, sir.

"Q. He never got up out of his bunk after that morning, after Wednesday morning, is that right?

"A. That's right.

"Q. I ask you this: did you see him outside on the deck at any time after Wednesday morning?

"A. No, sir.

"Q. Did you ever see him in the messroom after Wednesday morning?

"A. No, sir.

"Q. Did you see him smoke any cigarettes after he took sick?

"A. No, sir, he no smoke, no.

"Q. What was the condition of the forecastle room in which Santiago slept?

"A. It is all wet.

"Q. Were any of the officers, as far as you know, taking care of Santiago while he was sick on this trip?

"A. No, sir.

"Q. That was the first cool weather you had had on this voyage, wasn't it—when you were 22 hours from New York?

"A. Yes, coming over from Boca Grande.

"Q. And outside of that, just before you got into New York, the weather was always warm, wasn't it?

"A. No, sir, sometimes rainy and wet and cold too.

"Q. What days did it rain?

"A. I can't tell you that.

"Q. You say that Santiago did everything in the bunk?

"A. Yes, sir.

"Q. What do you mean by that?

[fol. 110] "A. See, the man—he can't get up, nobody can help, like if he be in hospital; anybody can help in the hospital, nobody can help.

"Q. You mean instead of going to the toilet, he did everything right in his own bunk—is that what you mean?

"A. Yes."

Mr. Rosenberg: That is all.

Mr. Crawford: Direct examination by Mr. Rosenberg, continuing where he left off (reading):

"Q. Did you see where the water came from that made it wet?

"A. The water come out from the top, all the leak come up right in forecastle.

"Q. Do you mean the water came up from on top of the forecastle?

"A. Yes, it leak, you see, that's the forecastle, it up here on the bottom where the sailors sleep—and the firemen, everybody sleep here in the bottom.

"Q. You mean that water leaked down from over the forecastle—from the top of the forecastle down through into the sailors' room and into the firemen's room too?

"A. Yes, sir."

Mr. Crawford: Page 14, cross-examination (continuing reading):

"Q. Where you were—did you strike any storm on this voyage, didn't you take water over the bow?

"A. No, sir.

"Q. You didn't strike any storm?

"A. No, sir.

"Q. Did you take any seas over your bow during that voyage?

"A. When we go out from port.

"Q. Did you strike such stormy weather that the water came over the bows of the ship?

"A. Yes, sir.

[fol. 111] "Q. What day?

"A. I can't tell you.

"Q. How many days did you have this stormy weather?

"A. I don't remember.

"Q. Did you have stormy weather on Monday when you lay at Boca Grande?

"A. No, sir.

"Q. The seas didn't come over the top of the ship that day, did they?

"A. No, sir.

"Q. Where did this water come that you say leaked in from the top of the forecastle?

"A. Big weather.

"Q. When did you get this big weather?

"A. That's what I tell you, I can't remember.

"Q. You don't remember when you got it?

"A. No, sir.

"Q. And you want to tell me that it leaked right down so that it wet the beds, is that right?

"A. Yes, sir.

"Q. Wet every bed in the forecastle?

"A. In the forecastle be all full of water when it rained, it leaked all over.

"Q. All over the floor?

"A. Was leaking all over.

"Q. Every bed was wet?

"A. Couple of bunks.

"Q. But the one Santiago was in you saw was wet?

"A. Yes, sir.

"Q. Did you feel it with your hand?

"A. They had to change him from this bunk to another one so no be wet"——

"Q. Did you ever see anybody come in and feed Santiago —give him food—give him soup?

"A. Nobody there.

"Q. Nobody ever gave him any food?

"A. No.

"Q. That's your story—they let Santiago starve there in the forecastle, you say—is that right?

"A. You ask to me if anybody give some food—all right—I say no sir.

[fol. 112] "Q. That's the only time the water came in the forecastle was when it rained, wasn't it?

"A. When the ship have bad weather.

"Q. And that's the only time there was any water in the forecastle was when you were having heavy, bad weather and when it rained, is that right?

"A. I guess so.

"Q. Where did you find these seven packages of cigarettes—in Santiago's bunk?

"A. No, sir.

"Q. Where did you find them?

"A. I find them in the suitcase.

"Q. You took them away, didn't you, because you were afraid he would smoke them, so he would not smoke them?

"A. No, sir.

"Q. Did he give them to you?

"A. I steal it.

"Q. You stole it?

"A. I don't have a cigarette—I look in the bunk."

Mr. Rosenberg (reading):

"Q. Do seamen—is it a practice of seaman to steal cigarettes on board ship?"

Mr. Crawford: I object. What difference does it make whether it is the practice? The question is whether he did in this case, and goes to the credibility.

The Court: I will allow it.

"A. Yes, from one to another."

Mr. Rosenberg: That is all. That is plaintiff's case.

MOTION TO DISMISS

Mr. Crawford: I move to dismiss the complaint on the ground the plaintiff has failed to make out any cause of action under the law.

[fol. 113] Plaintiff's duty here is to go a great deal further than merely showing that there were some acts on board this ship which we might describe as negligent acts, for the purpose of argument. He must show that as the result of any of these acts, this failure to treat in one way or another, this plaintiff's intestate's condition became worse and that, as a matter of fact, his condition was aggravated

by one or more of these acts complained of, and that as the result thereof he died. The plaintiff has called a medical witness, and there is not one word in his testimony to connect up any one of these various acts complained of with the aggravation of the man's illness or with his death.

I say, even on the plaintiff's own testimony—only the last witness whose deposition he read, Rosado, testified that for two or three days he was not so sick.

The Court: I suppose the theory of the plaintiff is that there was negligence and that proper treatment was not given, under the circumstances, on board the boat, and in the alternative that there was negligence in not putting him ashore, under the conditions, and that that is the negligence of which they argue existed and caused the man's death.

Mr. Crawford: Might have caused his death.

The Court: Dr. Kienzle's testimony shows, and in answer to the hypothetical question he says that "if the man had been given treatment or if he had been put in a [fol. 114] hospital there would be a good chance of recovery, but I think his chances were greatly diminished". That is sufficient causation, and I think I will have to let the case go to the jury.

Mr. Crawford: No case has been established under the maritime law or under the common law.

The Court: This is brought, I suppose, under——

Mr. Rosenberg (interposing): Jones Act. That covers death as the result of negligence; the Jones Act covers it.

Mr. Crawford: There is no recovery under the Jones Act for death by illness.

The Court: How about the common law?

Mr. Crawford: No ground of recovery under the common law.

The Court: Have you any authorities?

Mr. Crawford: Yes. (Reads authorities to Court.)

The Court: I will deny the motion, so far as it is based upon the fact that no negligence and no causation has been shown, it being my view that upon the evidence offered in behalf of the plaintiff the jury might find for the plaintiff upon each of those issues.

So far as the motion is based upon the ground that no maritime law nor common law gives the plaintiff the right to maintain such cause of action, I will reserve decision.

Mr. Crawford: Exception.

[fol. 115] MILTON WILLIAMS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Captain Williams, are you a licensed captain?

A. Yes.

Q. When did you get your license?

A. I got my first master's license in 1924.

Q. Do you know what the rule in this country was prior to the year 1922 in respect to the necessity for a course in first aid by officers who got shipping licenses?

A. If the original license or any certificate shows that he had passed his first aid, there is no requirement for a licensed officer renewing his license to show his first aid certificate. I know this to be a fact, because my license expired last year and I had it renewed at the Custom House.

Q. Are you associated with A. H. Bull & Company, this year?

A. Yes.

Q. Are they connected with the defendant in this case?

A. Yes.

Q. What are your duties?

A. Port captain for A. H. Bull.

Q. Did you have occasion to go aboard the vessels of the Baltimore Insular Line and this "Delisle"?

A. It is my duty to go on board all of the steamers, not only in this port but any other port where I can travel to and go aboard them.

Q. Now, did you go aboard the steamer "Delisle" early in October, in 1928?

A. I went aboard the steamer "Delisle" in October, 1928, in the early part.

Q. What did you do at the time on the steamer?

A. Made the usual inspection which it is customary to make when a vessel arrives in port.

[fol. 116] Q. Did you go up in the forecastle?

A. I went all over the vessel.

Q. Is the sailors' toilet forward of the forecastle?

A. It is.

Q. What did you observe if anything in respect to the portholes in the sailors' forecastle, the doors and the machinery composing the ports?

A. I did not observe anything in particular, except that they were there and that the glass was not broken.

Q. Did you observe those ports for any defects?

A. I did not make a close inspection of them. If there had been a defect it would be in the report, the list which is turned over to me.

Q. Will you tell us what is the necessity of having these ports in good condition and being able to close them at all times?

A. The ports in the forecastle and in the wash room and all quarters of the forward end of a cargo boat have to be in good order, because when the vessel is deeply laden the seas wash over the top of the forecastle and if the ports were not properly closed and were not good and solid, the seas would wash into the forecastle in a full stream about eight or ten inches in size, or whatever the size of the port-holes are.

Q. Will you describe the construction of these sailors' toilets and state the various things that are found there in the way of shower baths, drains, and so forth?

A. The sailors' wash room is immediately forward of the sailors' forecastle and is entered from the alleyway. When you step inside the door, the door being on the after end, there is a shower bath in the forward end and two water closets or out ports on the side of the ship on a raised platform.

[fol. 117] Q. Is the floor of the toilet sloped so that any water accumulating will run out of the drain?

A. The cement floor in the toilet is graded to allow the water to run into the drain and overboard.

Q. Was that drain in good operating condition when you examined it on the ship?

A. It is not customary to examine every one individually. If there is any water in the toilet I would not be able to see the condition there. Apparently it was O. K., because there was no water in the toilet.

Q. Is that drain of sufficient size to carry off all water that accumulates in the toilets?

A. It is.

Q. Captain, from your position as port captain of the operating company, A. H. Bull & Company, do you know what has happened to the master of this ship, Captain Cullison?

A. Captain Cullison died of cancer about two and one-half months ago at Baltimore.

Q. Is the third officer of the ship, Kounse, still with the company?

A. He is not.

Q. Is the first mate, John W. Callis, still with the company?

A. Yes.

Q. Where is he at the present time?

A. In Porto Rico.

Q. Do you know whether the messboy on this ship, Rafael Robles is still with the company?

A. He is not.

Q. Did you see any leaky pipes in the sailors' toilet when you were there?

A. I did not see any leaking pipes. If I had I would have called it to the chief officer's attention.

Q. How high is the concrete partition carried up?

A. That question is rather hard to answer, because I do not know how thick the cement is all over, but from a quick [fol. 118] guess, and looking at the thing I would imagine it is about three to three and one-half inches high, the cement at the lowest part of the toilet.

Q. Did you inspect the toilet waste lines?

A. I did not make a thorough examination of them. I inspected them the same as every other part of the vessel, gave them a look, and they appeared to be O. K.

Q. Was it your duty to report anything on this ship you saw out of order?

A. It was my duty and it was customary for me to report different things to the chief officer. Besides that, when returning to the office, I made a report of the defects found, and followed it with a letter.

Q. Do you recall whether you reported any defects in connection with the portholes, about waste water lines, and the toilets, or with the drains in the toilet?

A. I know that I did not.

Mr. Crawford: That is all.

Cross-examination.

By Mr. Rosenberg:

Q. How old is the steamship "Delisle"?

A. It was built in 1918 for the Shipping Board.

Mr. Rosenberg: That is all.

(Witness excused.)

Mr. Crawford: Reading from the deposition of the ship officers and seamen taken at Baltimore, in 1929:

"Captain ZACK W. CULLISON, a witness of lawful age, called on behalf of the defendant, after being first duly sworn, testified as follows:

"Direct examination:

"The Witness: I am the master of the steamship 'De- [fol. 119] lisle.' I have been master of her for six years past. I have been going to sea since 1900. I have held a master's certificate fourteen years. I have my third issue of master's certificate. It will be fifteen years this year.

"Q. And you have been master of vessels how long?

"A. I have been master of vessels since 1910.

"Q. Do you remember on which side of the quarters Santiago's bunk was on that voyage?

"A. Right up against the bulkhead between the passageway and the room, the alleyway and the room.

"Q. And what sort of weather did you have on that voyage?

"A. Fine weather.

"Q. Was it clear?

"A. Clear, warm; regular Indian summer weather.

"Q. Did he give any indication of illness on that voyage down?

"A. None whatever; no, sir, not going South.

"Q. Do you know whether Santiago was working about the ship that day at Boca Grande?

"A. Yes, sir; he was.

"Q. Did you see him yourself?

"A. Yes, sir, he helped to batten the ship down that evening.

"Q. Did he give any indications, so far as you could see, of illness on that day?

"A. No sir; not at all.

"Q. When did you first hear that he was not well or that he was feeling ill?

"A. On the morning of the 17th.

"Q. At about what time?

"A. After eight o'clock in the morning.

"Q. Who reported his condition to you that day?

"A. The chief officer.

[fol. 120] "Q. What did he say?

"A. He said the man was sick.

"Q. Did he say what he was suffering from?

"A. He said he was vomiting and sick at the stomach.

"Q. Did he say anything about any temperature?

"A. I had his temperature taken at that time.

"Q. And what was his temperature?

"A. 103, as near as I can remember.

"Q. Well, did you prescribe anything for him then?

"A. Yes, I told him to give him—with the fever that he had I thought of going back to the old traditions—starve a fever and feed a cold—so I prescribed a purgative for him and some quinine. I thought he was a little grippey or had a cold or something.

"Q. And whom did you direct to give him the medicine?

"A. The chief officer.

"Q. Did you get it out of the medicine chest yourself?

"A. No, sir. I didn't. The steward got it out for me. The steward carries the key for the medicine chest.

"Q. You didn't tell the steward to give it to him?

"A. No, I told him to get the key from the steward and get the medicine.

"Q. Did you give any directions to the steward as to feeding him?

"A. Yes, sir, I ordered him to put him on a diet; after I found his temperature was hanging up I thought it best to give him light food such as orange juice and lemonade in the morning and broth at noon and evening; but he always hollered for heavy food.

"Q. Do you know whether this broth was specially made for him?

"A. Yes; it was specially made for him.

"Q. Now, did you have his temperature taken often, do [fol. 121] you know, on the way up?

"A. Yes, sir; twice every day.

"Q. And you found it was what—how did it vary?

"A. His high was 104; from 101 to 104.

"Q. And that is all entered in the log book, is it?

"A. Yes, sir.

"Q. Whom did you direct to take his temperature?

"A. The steward and the third mate, the chief officer being busy around the deck with his routine work and I put them on the job.

"Q. Had you had experience before with Porto Ricans in your crew having fever and running temperature?

"A. Yes, sir, they are a peculiar class of people. They run temperature and will be deathly sick for possibly three or four hours, and they wrap their heads all up and cover themselves up, and when you ask them what is the matter, they tell you 'I got a fever'; and an hour after that they are all well and on the job again as lively as ever. I know it is one of the peculiarities of these people. They are peculiar people along that line.

"Q. Now, did you go down to see him yourself?

"A. As often as I could.

"Q. In his quarters?

"A. In my crippled condition I went up there as often as I could. I think I made three trips up there, as near as I can remember.

"Q. Did you lose your leg on the ship?

"A. Yes, I lost a leg in the same ship three years ago. It was in 1925.

"Q. How did you lose it?"

Mr. Rosenberg: I object to that.

Mr. Crawford: I think it has something to do with the case. It has a bearing. This captain's character is being [fol. 122] attacked in a way. I think it has a bearing on the whole situation to show how his leg was lost on the ship, what kind of man he is.

The Court: How does that have a bearing?

Mr. Crawford: On his attention to the crew, which is an issue in this case.

The Court: I will let it go in. Exception to Mr. Rosenberg.

"Q. How did you lose it?

"A. In the quadrant of the steering gear.

"Q. How did it happen?

"A. It was a gale of wind and we had broken our chains, and it was getting late in the evening and I wanted to have the ship's chains fixed up, and I went back aft to see how the mate was getting along with it, and I went back there and the mate had two tackles on it, and the mate had all his men around that quadrant without taking the turnbuckles up on it, and I looked over and saw the tackles strain; and I said, 'Get your men out of there quick', and all the men came out except one Porto Rican negro, and I jumped and grabbed him and threw him behind me; and it went over to the starboard and got me and cut my leg right off, but I saved the nigger.

"Q. Now, do you know whether these medicines were given to him again during the voyage?

"A. Yes, sir, two or three different times we gave him quinine and a purgative. I wanted to keep his bowels open and also keep down the cold or anything that he might have had.

[fol. 123] "Q. Did you, when you went to see him in the forecastle several times, did you see anything to indicate to you that he was dangerously sick?

"A. No, sir, nothing at all. The day we got to New York, coming up the coast, it was a beautiful day, and I seen him on No. 1 hatch. He was up around the forecastle with his clothes on.

"Q. Now, did you find out anything about his condition the night that you anchored off Old Orchard?

"A. I seen him that day on deck in the afternoon, and I thought the man was all right practically."

A Juror: May I ask a question? Is that Old Orchard, Maine?

Mr. Crawford: A place at the mouth of the Raritan River, which is just below Staten Island.

(Continuing reading:)

"Q. Did you get reports about his condition on the days that you did not go down and see him?

"A. Every day; yes, sir.

"Q. And who gave you those reports?

"A. The third officer and the steward.

"Q. And what were the reports that they gave you?

"A. Only about the same temperatures, running 102, 101, 103; sometimes—once I think—it went to 104.

"Q. Did they tell you that they had any trouble in having him keep the bed clothes over him down there?

"A. Yes, I told him to keep the covers on him. They said they couldn't do it; that every time they left he would throw them off of him.

"Q. Now, did you get a report on the morning that you came to the dock?

"A. I asked for it.

[fol. 124] "Q. Whom did you ask?

"A. The chief officer.

"Q. What did he report?

"A. He said he was a pretty sick man. I said, Do you think he is able to walk; I said I will have the ambulance for him; and I took it up with Captain McDonald, and Captain McDonald telephoned the public health service, I think at Staten Island, and they sent the ambulance over right away.

"Q. On these times that you went to see Santiago what was the condition of the forecastle with reference to cleanliness?

"A. It was about the same as always. The forecastle is cleaned out every morning. There is one man out of the mate's watch who just as soon as daylight goes forward and cleans the forecastle up, sweeps the alleyways up and the toilet.

"Q. Do you know whether he and the other sailors were given clean bed linen down in Boca Grande?

"A. I don't know whether in Boca Grande or not, but they are changed every Saturday.

"Q. You mean the sheet and the pillow case?

"A. The mattress slip and pillow slips and spread. Of course, the blankets go on for the voyage. They are washed every voyage.

"Q. Every voyage you wash them?

"A. Yes, they are sent to the laundry and washed.

"Q. What about the blanket and bed spread being sufficient covering for a man like that for the voyage up?

"A. Well, I never used any at all but, of course, being sick he would want something.

"Q. Yes; but was a blanket like that sufficient to cover him?

"A. Certainly; yes, sir.

"Q. You say you didn't sleep under a blanket yourself?

"A. Not on that voyage. We never had a temperature lower than sixty-four for the voyage.

[fol. 125] "Q. Did you have a higher temperature for most of the voyage?

"A. Yes; the last day before arriving in New York I think it dropped down to sixty-four. Was it sixty-four?"

"Q. Did he complain, so far as you know, of not having enough bed clothes?

"A. No, sir, no complaint at all.

"Q. Did he complain, so far as you know, of not having clean quarters or clean bed linen?

"A. No, sir, no complaint at all.

"Q. Did he make any complaint about his food?

"A. Nothing in the world.

"Q. What about the heating apparatus for the sailors' accommodation?

"A. We have a very good apparatus in first class condition.

"Q. Why wasn't there any steam on this voyage?

"A. It was not necessary. We did not want to turn it on.

"Q. Could steam be had if it was needed?

"A. Any time at all, if you asked for it. All that had to be done was to turn a little valve.

"Q. Why was it you did not put this man in the hospital room on the ship?

"A. I did not think it was necessary. It was way back in the stern of the ship away from everybody, and there was nothing contagious that I seen in him, and it was not necessary to put him in the hospital

"Q. Would he get better care forward?

"A. Absolutely better care forward than he could get there.

"Q. The log book contains an entry, does it, about medicine that you prescribed for him?

"A. Yes, sir.

"Q. You signed the log book, did you?

"A. Yes, sir."

[fol. 126] "Q. Was there any rain down there while you were at Boca Grande?

"A. No, sir.

"Q. And was there any rain on the voyage up?

"A. No, sir.

"Q. Do you remember whether you had any rainy weather coming down?

"A. No, sir; all clear, fine weather."

Mr. Rosenberg (reading):

"Q. Do you remember how many portholes there were in the sleeping quarters of the sailors?

"A. Four portholes; two on the side and two in the after end."

"Q. You say you were down there how many times?

"A. About three times, as near as I can remember. It might have been four, but as near as I can remember it was three times."

"Q. You were not there, were you, when the ambulance came?

"A. No, I was not."

"Q. Do you remember the highest temperature you got on that voyage?

"A. 104."

"Q. You did have some rain squalls while at sea, didn't you?

"A. Might be a little squall or something like that; have them many a time; it would rain forward and be clear aft.

"Q. You did have rain during the trip?

"A. Might be squalls; rain squalls.

"Q. Squalls?

"A. Yes, sir.

"Q. I notice from the log book here that on Sunday, October 21st, the temperature of the air was as low as sixty?

"A. Sixty-two, isn't it?

"Q. Sixty degrees; isn't that so?

"A. Sixty-two, I thought.

"Q. I show you the log book; isn't that sixty degrees there (indicating)? (Witness examines log book.)

"A. There is sixty there (indicating).

[fol. 127] "Q. It was as low as sixty degrees?

"A. As low as sixty degrees, yes.

"Q. On the 21st; that is Sunday; isn't that so?

"A. I think so.

"Q. What time of the day was that?

"A. Four A. M., in the morning.

"Q. Now, you say that you saw Santiago on the deck of the ship outside on Sunday, October 21st?

"A. Yes, sir.

"Q. You are sure of that, are you?

"A. Yes, sir, positive,

"Q. What was he doing?

"A. He was just sitting on the hatch.

"Q. Walking around?

"A. Well, he walked out to there.

"Q. Did you go down to see him and tell him that it was dangerous for him to be out on the deck?

"A. No, sir; I thought if the man felt like going out I did not see why I should stop him.

"Q. Did your ship have a wireless?

"A. Yes, sir.

"Q. You spoke about not using any covering in your bunk; you had a room of your own, isn't that so, on the ship?

"A. Yes, sir, up on the top side."

"Q. Aren't the portholes sometimes open in the lavatory?

"A. Practically all the time in good weather.

"Q. Well, the wind blows in through the porthole?

"A. Yes, sir.

"Q. If you happen to have a fever and you go into the lavatory you are apt to get some of that draft, aren't you?

"A. It is possible."

"Q. You do not expect the man with the high temperature to call on the captain for assistance?

"A. I don't expect a man to call on the captain to be a wet nurse for him, do you? The captain of the ship is not a doctor.

[fol. 128] "Q. The captain of a ship is not intimate with members of the crew, is he?

"A. He don't aim to be but when a man is sick he is given all the attention in the world.

"Q. But the captain is aloof from the members of the crew; isn't that so?

"A. Absolutely.

"Q. And if a seaman wants any help at all the chances are he would not want to go to the captain; isn't that so?

"A. The chief mate would come to me if he heard any complaint at all and ask my advice on it.

"Q. You saw him about three times during this voyage coming north?

"A. Yes, sir.

"Q. From Boca Grande to Carteret?

"A. Yes, sir.

"Q. Did you administer any medicine to him yourself personally?

"A. No, sir.

"Q. Did you take his temperature yourself?

"A. No, sir.

"Q. Did you see the third mate take the temperature of the man?

"A. No, sir.

"Q. Did you see the steward take his temperature?

"A. No, sir.

"Q. Were you present when the man ate any of his meals during the time of his illness?

"A. No, sir.

"Q. So when you say he ate a hearty meal, you did not see him eat it, did you?

"A. No, I did not.

"Q. Would you say that if some of the witnesses who have testified today have testified that the man could not eat, and ate very little; would you say that those men were inaccurate in their testimony?

"A. No, sir, I have nothing to say about it at all.

"Q. How many times were you in the forecastle?

"A. Three.

[fol. 129] "Q. How much time would you spend in the forecastle?

"A. Five or ten minutes, I guess, about.

"Q. Did you go in there with any other officer or alone?

"A. Always alone.

"Q. You did not wireless for any assistance for this man at any time?

"A. No, sir, I did not. I did not think it was necessary.

"Q. When the ship arrived at Old Orchard, New Jersey, on the afternoon of Sunday, October 21st, did you go down to see Santiago at that time?

"A. No, sir, I seen him——

"Q. What time did you anchor? At 6:36 P. M. at Old Orchard, New Jersey, on October 21st?

"A. Yes, sir.

"Q. You did not see the man that evening of October 21st?

"A. No, sir.

"Q. Did you see him the following morning, October 22nd?

"A. No, sir, I did not.

"Q. Will you describe the hospital room that was on the ship?

"A. The hospital room is aft on the starboard side in the alleyway in the poop deck.

"Q. How big a room is that?

"A. It is a room, I guess, 14 by 10.

"Q. And how many bunks?

"A. Four; wash stand and (interrupted).

"Q. Where is the lavatory in connection with the hospital?

"A. Right adjoining on the same side.

"Q. A separate room from the hospital?

"A. Yes, sir.

"Q. You claim it was the chief mate's duty to take care of Santiago, the man who took sick?

"A. I didn't say the chief mate; I said it was my duty, but I do it through them. I do not do it personally.

[fol. 130] "Q. You did it through them?

"A. What they done they done under my instructions.

"Q. What do you do while the ship is at sea?

"A. Everything in regards to navigating the vessel.

"Q. You are not at the wheel all day?

"A. I do not touch the wheel.

"Q. Who is at the wheel?

"A. The quartermaster and sailor.

"Q. And with the quartermaster is what other officer?

"A. The officer of the watch.

"Q. And during the day there is always an officer of the watch, one of the mates of the ship with the quartermaster who is steering the ship?

"A. That is right.

"Q. As a matter of fact, the officer of the watch, together with the quartermaster, is taking care of the navigation of the ship at their particular time, isn't that so?

"A. They are just during the watch; that is all.

"Q. I know, but you don't have to be around the officer and quartermaster to see that he is steering properly, do you?

"A. No, sir; that is the officer of the watch.

"Q. Your duties consist of being responsible for the work that the officers do under you; isn't that so?

"A. That is just the same as the quartermaster is under the officer, I imagine.

"Q. That does not mean you do the actual work?

"A. Oh, no. I take observations in the morning and check them up, at noon and take them again in the afternoon, check them up; and take star sight at night, as a rule.

"Q. How many times altogether, four times a day?

"A. Yes, sir.

"Q. How long does each observation take?

"A. Different times, according to the weather. In good [fol. 131] weather work them up in ten or fifteen minutes.

"Q. And checking up, you can do it in ten or fifteen minutes?

"A. Yes, sir, each one of them.

"Q. The actual work of the seamen is done under the officer, or the boatswain first?

"A. The first officer first.

"Q. Under the first officer is the boatswain?

"A. On some ships. Our ship is a small one; the first officer is boatswain; we have a small ship. It is not a big ship.

"Q. How much of a crew?

"A. Eight men and boatswain.

"Q. On this particular trip how much of an entire crew, including seamen and officers?

"A. I think thirty-three.

"Q. Thirty-three in all?

"A. Yes, sir.

"Q. You say by opening a valve in the seamen's quarters you can turn on the steam?

"A. Not in the seamen's quarters; in the engine room—in the fire room.

"Q. In the fire room down below?

"A. Down below on top of the boilers I think it is.

"Q. In other words, you must get your heat through the engineers; is that right?

"A. That is right.

"Q. I understand you were not present at any time after Santiago took sick when he was eating; you did not see him eat at any time?

"A. No, sir; I ordered this food carried to him, and word came back that he had eaten it.

"Q. You could have had heat at all times whenever you wanted it?

"A. Yes, sir, but I never had it.

[fol. 132] "Q. You did not use any covering when the temperature was down as low as sixty?

"A. No, sir. That thermometer is up on the bridge in the air. It would be sixty in the air and your room would still be seventy, and the quarters will still be seventy.

"Q. In other words, a seaman if he has a complaint to make would make it to the chief mate and not to the captain?

"A. I get all my complaints through the chief mate.

"Q. And seldom direct?

"A. The chief mate comes to me.

"Q. And tells you about it?

"A. Yes, sir."

Mr. Crawford: Now, the deposition of John W. Callis, who is the first mate (reading):

"JOHN W. CALLIS, a witness of lawful age, called on behalf of the defendant, after being first duly sworn, testified as follows:

"Direct examination:

"The Witness: I live at 4606 Tonawanda Avenue, Baltimore, Maryland. I am first mate of the steamship 'Delisle' and have been such since October 6th, 1928. Before that I was second mate from April 27th, 1927. I have been going to sea about eight years.

"Q. You were chief mate, were you, on the 'Delisle' on the voyage in October down to Boca Grande and back to Carteret?

"A. Yes, sir.

"Q. And who recorded the temperature on the two other [fol. 133] watches, the third mate?

"A. The third mate at twelve o'clock; and the second mate at four o'clock.

"Q. And were those temperatures entered in the ship's log book?

"A. Yes, sir.

"Q. Did you correctly record the temperatures in the log during your watch, Mr. Callis, on the voyage up from Boca Grande?

"A. Yes, sir.

"Q. Do you know whether he worked on the ship that day at Boca Grande?

"A. The 16th?

"Q. Yes.

"A. At the 16th, yes; he worked in the afternoon; none worked in the morning I left; each hatch we got ready to batten, and the sailors, boatswain and myself battened them down.

"Q. You saw him helping to batten down the hatches?

"A. Yes, sir.

"Q. How warm was it down there that day in Boca Grande?

"A. Eighty-three at four o'clock in the afternoon; and at four o'clock in the morning it was eighty.

"Q. When did you first learn that Santiago was sick?

"A. Eight o'clock Wednesday morning, October 17th.

"Q. That was the day after you left Boca Grande?

"A. Yes, sir.

"Q. And who reported that to you?

"A. He reported it to me himself.

"Q. And where were you then?

"A. Where was I?

"Q. Yes.

"A. Just after I came off the bridge; I came off at eight o'clock; and he was down amidships, and he told me; he was on the amidships deck, and he came and told me. He patted his stomach and his face.

"Q. And did you feel him at all then?

[fol. 134] "A. Yes; his face was hot; and I gave him a dose of quinine and a dose of salts.

"Q. Did you give instructions?

"A. I saw he went to bed then.

"Q. Did you go in the forecastle then?

"A. Yes, I was in the forecastle.

"Q. And what medicine did you prescribe?

"A. Quinine and salts.

"Q. What were they—was that Epsom salts?

"A. Yes, sir.

"Q. And who gave him the medicine?

"A. The steward gave it to him.

"Q. And how did you happen to prescribe that medicine?

"A. Quinine for his fever, and he was sick in the stomach, and salts to clean him out good, the only thing I could do.

"Q. What did you diagnose as his trouble at that time?

"A. I thought he had just a little fever and he would get over it in a couple of days, tropical fever.

"Q. Did you think it was anything serious at that time?

"A. No, sir, I did not.

"Q. Now, did you see that he was put to bed then?

"A. Yes, sir, I seen he was put to bed then, and he stayed in bed until, I believe, the Sunday before we arrived. We arrived Monday night and anchored in New York Harbor there, Old Orchard.

"Q. What did you do after taking his temperatures after this first time; did you take it this first time?

"A. Yes, sir.

"Q. And did you record it in the log book?

"A. Yes, at 5:45.

"Q. Was that P. M.?

"A. Yes, P. M., and it was 104. Then the third mate took it at midnight.

[fol. 135] "Q. What was it then?

"A. 102.

"Q. What was it on the other days?

"A. The next morning at eight o'clock it was 104. That is the 18th. The 19th, it was 103. The 20th it was 103. The 21st it was 103; and the next day we arrived at the pier."

Mr. Crawford: That was the 21st. Now, the witness testifies on page 52 that all the temperatures were taken every four hours on the ship. I think if I might take this page out of the record and introduce it as an exhibit, it would be much handier, that it would be better.

I offer in evidence page 52 of the testimony of Callis, as showing the temperatures taken on the ship. It is also recorded in the ship's log.

(Marked Defendant's Exhibit B.)

"Q. He was taken away from the ship on the 22nd, was he?

"A. Yes, sir.

"Q. About what time was it on the 22nd?

"A. At 4:30 P. M.

"Q. And he was taken away by an ambulance, was he?

"A. Yes, sir.

"Q. By a doctor from the Marine Hospital; was he?

"A. Yes, sir.

"Q. And he died the subsequent day, did you hear?

"A. Yes, sir. He died at daybreak early the next morning.

"Q. Did the doctor talk with you about him when he came to take him away?

"A. He asked what I was giving him, and I told him; and how he was acting, and I told him I heard he was spitting [fol. 136] up blood and I thought it was T. B., and he examined him, and he may have had T. B. and double pneumonia. He said he had pneumonia then.

"Q. Did the doctor criticize in any way the medicines or the treatment that you gave him?

"A. No, he did not say anything."

"Q. Are there any steam radiators in the sailors' quarters?

"A. Yes, sir.

"Q. Were they at the time?

"A. Yes, sir."

"Q. And what was necessary in order to get steam in those radiators?

"A. Just ask the chief engineer or either one of the assistants and they would turn it on down below.

"Q. Do you know why they would not have steam on the voyage coming up?

"A. Because they did not need it and did not ask for it.

"Q. Did you have any steam on in your quarters coming up?

"A. No, sir.

"Q. Did you find you needed any steam in your quarters?

"A. No, sir.

"Q. Do you know whether the steam radiators were in working condition at that time?

"A. Yes, sir, they were.

"Q. You were in the sailors' quarters, were you, from time to time on the voyage up?

"A. Yes, sir.

"Q. Were you there in the daytime or evening or when?

"A. Probably in there two or three times a day, evening and morning, too.

"Q. And did you see what the condition of Santiago's bedding was?

"A. Yes, it was clean.

"Q. And what did it consist of?

"A. Colored sheet, pillow case, a spread and a blanket.

"Q. And what can you say as to whether or not the blanket was sufficient cover for him on the voyage up?

[fol. 137] "A. Yes, sir; in fact the spread would have been sufficient cover as warm as it was then.

"Q. You prescribed the medicine, did you not?

"A. Yes, sir.

"Q. And did you consult the captain also about that?

"A. Yes, sir.

"Q. And who gave him the medicine?

"A. The steward gave it to him.

"Q. And do you know how often he got this medicine on the voyage up?

"A. No, sir.

"Q. Had you any suspicion that he was dangerously ill coming up?

"A. No, sir.

"Q. Did you see him spit any blood on the way up?

"A. Yes, I seen him spit blood once.

"Q. What conclusion did you draw from that?

"A. I thought he had consumption.

"Q. Did he cough any?

"A. Yes, quite a bit.

"Q. Which part of the voyage?

"A. Coming up and down, too, I heard him coughing.

"Q. Had you any other reason to think that he might have consumption?

"A. No, sir, only by the looks of his face; sallow complexion; didn't look very bright; looked like a consumptive to me but I didn't know what it was.

"Q. Who cleaned out the crew's quarters and toilet?

"A. Sailor on the four to eight watch and my watch.

"Q. Under whose supervision?

"A. Mine.

"Q. Did you see that that was done?

"A. Yes, every morning at eight o'clock.

"Q. What was the condition of the crew's quarters and toilet on the way up?

"A. Clean; very clean.

"Q. What food was given him on the way up?

"A. I don't know what food was given him.

"Q. And the captain, or did you give orders as to what [fol. 138] he should have?

"A. No, sir, I did not give orders as to what he should have. The captain might have; I wouldn't say."

"Q. Did Santiago perform his duties on the voyage down?

"A. Yes, sir.

"Q. Did he complain at all to you of being ill?

"A. No, sir.

"Q. Did you ever hear of his being ill on the voyage down?

"A. No, sir.

"Q. Did you see him working about the ship?

"A. Yes, sir."

"Q. Had you had experience with the men down there having this fever?

"A. No, I had not any experience in that; no, sir."

"Q. You anchored at Old Orchard, you say?

"A. Yes, sir.

"Q. Is that near the Raritan River?

"A. On the Raritan River.

"Q. And Carteret is a little ways up that river?

"A. Yes, sir; we stopped there for a towboat and a pilot.

"Q. That is at 6:35 P. M. you stopped there?

"A. Yes, sir.

"Q. Now, the next morning you were towed up?

"A. No, sir, we were not towed up. We were assisted by the tug but we ran under our own steam.

"Q. And then you went up to the Carteret dock?

"A. Yes, sir.

"Q. Do you remember what the temperature was that night where you anchored? (Witness refers to log.)

"A. Sixty-two at four o'clock in the afternoon; sixty-two.

"Q. Was it the 20th when you say he seemed better?

"A. I didn't see him but a sailor said he was up and smoking a cigarette; he was up around the forecastle, they said; I did not see him myself.

[fol. 139] "Q. You don't know how he ate on that day?

"A. No, sir, I don't.

"Q. He was taken away from the ship on the 22nd, was he?

"A. Yes, sir.

"Q. About what time was it on the 22nd?

"A. At 4:30 P. M."

"Q. And do you know how often he got this medicine on the voyage up?

"A. No, sir.

"Q. What food was given him on the way up?

"A. I don't know what food was given him.

"Q. Do you know in a general way what the sailors receive in the way of food? How did it compare with what you got?

"A. No, I didn't know.

"Q. What are the duties of a chief officer on board a ship?

"A. Well, general upkeep of the deck department of the ship, in charge of the deck department of a ship.

"Q. In charge of the deck department of the ship?

"A. Yes, sir.

"Q. Does that mean in charge of the men as well?

"A. Yes, sir, in charge of the sailors and boatswain.

"Q. And Santiago, he belonged to the deck department?

"A. Yes, sir.

"Q. Now, you did not personally have anything to do with the actual giving of the quinine and salts, is that so?

"A. No, sir."

Mr. Rosenberg: Page 61. (Continuing reading:)

"Q. When this ship left Boca Grande what course did she take with reference to the shore; did she hug to the shore or did she go out to sea?

"A. She goes to sea from there to Key West, and from Key West on up the Gulf Stream up north to Jupiter they [fol. 140] hug the shore, then they go to the sea.

"Q. For how long a period do they hug the shore; for how a long a time?

"A. About thirty-six hours.

"Q. After reaching what point?

"A. Jupiter."

Mr. Rosenberg: Page 62. (Continuing reading:)

"Q. Did you at any time give to Santiago any medicine personally?

"A. No, sir.

"Q. Now, you noticed that he was spitting blood on his way down?

"A. No, sir, I didn't say I did; we were almost in New York, coming back.

"Q. But on your way to Boca Grande?

"A. No, sir, I didn't see him spitting blood.

"Q. Now, how long did this ship, the 'Delisle', remain anchored at Old Orchard on this trip north to Carteret?

"A. From 6:35 at night to 6 A. M. the next morning.

"Q. Approximately twelve hours, isn't that so?

"A. Yes, sir.

"Q. What is the nearest port to Old Orchard?

"A. Perth Amboy, New Jersey.

"Q. How far away is Perth Amboy from Old Orchard?

"A. About twelve or fifteen miles.

"Q. Did it occur to you at that time that it would be advisable to see that Santiago was taken off and sent to Perth Amboy?

"A. No, sir.

"Q. Was Santiago walking around in the forecastle after Wednesday morning?"

Mr. Rosenberg: Now, the answer, just part of the answer (reading):

"A. I did not see him walk around at all——

[fol. 141] "Q. Now, did you go into the forecastle in Santiago's quarters with the steward at any time?

"A. No, sir, I don't believe I did.

"Q. That is, whenever the steward went there he went all alone?

"A. As far as I know, he went alone.

"Q. Did you see the master of the ship go into the forecastle where Santiago was lying sick at any time?

"A. Well, now, I didn't see him, but he was up there I am quite sure.

"Q. You didn't go with him?

"A. No, sir.

"Q. And you didn't see him go there?

"A. No, sir, I didn't see him.

"Q. Was any particular sailor assigned to Santiago to help him?

"A. No, sir, but he didn't say anything about being helped to the toilet or anything.

"Q. Still his temperature was 104 degrees at times; that is so, isn't it? That is high, isn't it?

"A. That is pretty high; yes, sir.

"Q. Do you know whether he was eating much during this time he was so ill?

"A. No, the messboy was feeding him, and said he didn't eat very much. I didn't see him eat.

"Q. You never accompanied the messboy into the forecastle when he was getting fed, did you?

"A. No, sir.

"Q. What time did the ship dock in Carteret, New Jersey?

"A. (Witness refers to log) 8:45 A. M.

"Q. What time of the day did you see Santiago—that was the 22nd, wasn't it?

"A. Yes, sir.

"Q. What time of the day did you see him?

"A. I saw him that morning.

"Q. Did you see him on Sunday, the day before?

"A. Sunday morning.

[fol. 142] "Q. Did you see him after the ship docked, after the ship anchored at Old Orchard?

"A. No, I don't believe I did——

"Q. Did any of the officers go to see him that night when the ship was anchored at Old Orchard?

"A. I don't know that they did.

"Q. What do you think, that they did or not?

"A. I cannot say because I don't know. I didn't see any of them go up there.

"Q. Did you order any of them to go up there?

"A. No, sir, I did not.

"Q. Did the master of the ship order you to go there?

"A. What, Sunday evening?

"Q. Sunday evening?

"A. No, sir.

"Q. Did you ever see the master and the steward go in to see Santiago at all?

"A. No, sir, I didn't see them go in there.

"Q. Did the master have any special or unusual duties at sea during this voyage from Boca Grande to Carteret?

"A. No, I don't believe he did; not to my knowledge; no, sir.

"Q. He had no watches of his own, is that a fact?

"A. No, sir, he did not.

"Q. His time is all his own excepting that it was his job to see that the work of the vessel was properly done; isn't that so?

"A. That is my job, to see that the work of the vessel was properly done; his job is the navigation of the ship.

"Q. And it is your job to see that the work of the vessel was being properly done?

"A. Yes, sir.

"Q. How many hours a day will the master be engaged in duties with reference to the navigation of the ship?

"A. Well, some days maybe a couple of hours, and then [fol. 143] again it may be twenty-four hours; according to the weather.

"Q. If the weather is fair and nothing unusual is going on, how much time?

"A. A couple of hours.

"Q. Was the master spending more than a couple of hours a day during this trip from Boca Grande to Carteret?

"A. Well, he didn't until the night we arrived in New York.

"Q. What do you mean, the night you arrived at Old Orchard?

"A. Yes, sir; I guess he spent four or five hours that afternoon.

"Q. That is, on Sunday; on Sunday, October 21st the captain was engaged in doing what that was unusual?

"A. It was not unusual, but it was the navigating of the ship going into port. That is his duty.

"Q. But he was free on Sunday night, wasn't he?

"A. When he was anchored, sure.

"Q. Was he on board ship at that time?

"A. Yes, sir.

"Q. Did he go in to see Santiago that night?

"A. I didn't see him go there.

"Q. Did you and he discuss the condition of Santiago that night?

"A. No, sir.

"Q. Did you and the steward discuss the condition of Santiago that night?

"A. No, sir.

"Q. Sunday night?

"A. No, sir.

"Q. Did you take his temperature or did someone take it?

"A. I took his temperature that morning.

"Q. Only in the morning but not Sunday night?

"A. No, sir.

"Q. What was his temperature on the morning of the 22nd?

"A. 103.

"Q. You had not seen him since the morning of the 21st, is that right?

"A. Yes, sir.

[fol. 144] "Q. What else in addition to what you have already testified to—what else did you do for Santiago in connection with his sickness?

"A. That is about all, I believe, except called for the ambulance when we got into port."

Mr. Rosenberg: Your Honor, as part of the plaintiff's case, I have asked my opponent to stipulate that shipping articles were signed in this case by the deceased in the Borough of Brooklyn, County of Kings, State of New York, at the time he made this voyage in October, 1928.

Mr. Crawford: I will concede that.

Mr. Rosenberg: It is also conceded that this is the way that the deceased looked (handing photograph to counsel)?

Mr. Crawford: It is a photograph.

Mr. Rosenberg: A photograph of the deceased at the time he went aboard the ship, and I want to offer it in evidence as part of plaintiff's case.

Mr. Crawford: No objection.

(Marked Plaintiff's Exhibit No. 3.)

MOTION TO AMEND PLEADINGS

Mr. Rosenberg: I move to amend my pleadings to conform to the proof as of the time of the close of the case, plaintiff's case.

The Court: Motion granted.

Mr. Crawford: In what respect to what?

Mr. Rosenberg: As to where he signed articles.

[fol. 145] Mr. Crawford: Of course, I have no objection to that.

Mr. Crawford: Reading deposition of AXEL TORNQUIST, a witness of lawful age, called on behalf of the defendant:

"Direct examination:

"The Witness: I am chief engineer of the steamship 'Delisle.' I have been her chief engineer more than six years. I have been engineer of steamships twenty-nine years on American ships, and before that on Swedish ships. I live at 417 West Franklin Street, Baltimore."

"Q. When you made that voyage up from Boca Grande to Carteret, leaving there on the 16th of October, 1928, will you tell us whether you turned the steam on at all in the sailors' quarters?

"A. No, sir; it was never asked for.

"Q. When steam is wanted in the sailors' quarters how do you find it out?

"A. Well, if it was kind of chilly or so I used to turn it on all over the ship, but this was in the summer time, in the fall of the year, and it was not needed, but sometimes if the quarters get damp or so they ask me for it and I turn it on to dry the place but it was never asked for; nobody asked for it.

"Q. You turn it on whenever they ask you to?

"A. Yes, sir.

"Q. Do you remember whether you used a blanket to sleep under on that voyage coming up?

"A. No; I am sure I did not. I don't know about the last day. I cannot remember that.

"Q. Did you ever get any request on that voyage to put [fol. 146] steam on in the sailors' quarters?

"A. No; neither sailors' nor firemen's quarters; sailors were on one side and firemen on the other, and neither asked for it.

"Cross-examination:

"Q. When your ship, the 'Delisle,' left Boca Grande on October 16th, 1928, did any of the officers of the ship tell you to see to it that the seamen's quarters should have steam?

"A. No.

"Q. Did the captain or any of the officers tell you that there was someone sick in the forecastle?

"A. Yes, I heard about it.

"Q. Did they tell you to put on steam, to see that there would be steam there on that account?

"A. No, sir.

"Q. If the captain had so ordered you or if one of the mates had ordered you to do so, you would have turned on the steam; isn't that so?

"A. Yes, sir; sure.

"Q. About what temperature do you turn on the steam without the seamen asking you to do so; when the temperature is at what?

"A. I turn it on lots of times when the temperature is around sixty; if the place is damp or so I dry it up.

"Q. If a man is sick and if he is in the forecastle and the temperature is around sixty, you might turn on the steam voluntarily; isn't that so?

"A. Yes, I would if they had asked for it.

"Q. If he was too sick to ask for it you would do it yourself, wouldn't you?

"A. Yes, if I thought it was damp or if it was needed to be turned on.

"Q. If you thought the man was pretty sick in the forecastle and the temperature outside was sixty, you would put on the heat yourself without his asking for it, wouldn't you?

"A. No.

[fol. 147] "Q. I say if the temperature was sixty and the man was very sick in the forecastle, so sick that he would not have the strength or he would not think about it, if he had fever so that his mind would not be on going down to the engineer for steam, wouldn't you turn on the steam yourself so as to accommodate the man who was sick if the temperature was around sixty?

"A. I might have done that but I wouldn't do it if it was not needed.

"Q. You did not know how sick the man was; is that right?

"A. No.

"Q. You had not been told?

"A. No, sir.

"Q. So, therefore, you did not turn on the steam; isn't that so? Yes or no.

"A. No, I didn't know the man was that sick.

"Q. You didn't go up in the forecastle yourself to inquire whether this sick man needed it, did you?

"A. No.

"Q. How many times were you in the firemen's quarters?

"A. All the doors were open, oilers' quarters and firemen's quarters; the doors were all open; so were the doors of the sailors' place.

"Q. You mean they were open all the time, kept open day and night?

"A. Yes, they always leave them open if it not cold enough.

"Q. And was the door leading into the passageway—there is a passageway between the seamen's quarters and the firemen's quarters?

"A. Yes.

"Q. Was that kept open, too?

"A. Yes, I believe that door was open.

"Q. * * * Do you know whether the portholes were kept open or not?

"A. No, I don't know anything about that. I think they were in the firemen's place there.

"Q. Do the firemen and seamen use the same lavatory?

"A. Yes, sir.

[fol. 148] "Q. And that lavatory is forward of the firemen's and seamen's quarters?

"A. Yes, sir.

"Q. The porthole in that lavatory—how many portholes were there in that lavatory?

"A. I don't think there is more than one.

"Q. That porthole is usually kept open to keep the lavatory from smelling badly; isn't that so?

"A. Yes, sir.

"Q. Sometimes it is drafty in that lavatory?

"A. Well, there is a draft there; they keep that porthole open for circulation of air.

"Q. It makes it drafty, isn't that so? I mean, you are apt to get a draft from the porthole; they want circulation in that lavatory so as to keep the place smelling well; isn't that so?

"A. I don't know if there is much draft.

"Q. The air circulates in there all the time from the porthole; isn't that so; otherwise it would keep smelling?

"A. Naturally. If you got the door open and the porthole open——

"Q. (Interrupting.) You would have a draft, a circulation of air; isn't that so? That is a simple question, yes or no?

"A. That is a natural question, more or less.

"Q. More or less? If you open a window and open a door you will get a draft?

"A. Yes.

"Q. I show you this log book (referring to smooth deck log, Defendant's Exhibit B) and ask you to turn to the entry relating to October 21st, 1928, Sunday, where the temperature of the air is noted down as sixty degrees?

"(Witness examines log book.)

"Mr. Rosenberg: That shows sixty degrees in the morning, Sunday morning, isn't that so; sixty degrees?

[fol. 149] "The Witness: At four o'clock on Sunday morning, yes.

"Q. The ship was not at anchor Sunday morning at four o'clock, was it? According to the log book it was anchored at 6:35 P. M. Sunday; isn't that so; 6:35 anchored?

"(Witness refers to log.)

"A. Yes.

"Q. So that when the temperature was sixty the ship was still moving, isn't that so, looking at the log book?

"(Witness examines log.)

"A. That is what it says there.

"Q. You get a certain amount of breeze when the ship is at sea; don't you, always?

"A. Oh, yes.

"Q. Particularly in the month of October?

"A. If she has got headway, yes.

"Q. Isn't that so? You say, if she has headway; what do you mean by that?

"A. Well, if she is under way.

"Q. And there is a certain amount of breeze always when she is under way?

"A. Yes.

"Q. I ask you to look at the log relating to October 21st, 1928 (referring to smooth deck log, Defendant's Exhibit B), and ask you if the log does not indicate that there was a fresh breeze blowing at eight A. M. on the 21st?

"A. Yes, sir.

"Q. And on the morning of October 21st when it was four A. M. the log book shows that there was a—that it [fol. 150] was clear but a choppy sea; isn't that so; doesn't the log book show that?

"(Witness examined smooth deck log.)

"A. Yes."

Mr. Crawford, reading deposition:

"John Paul Kounse, a witness of lawful age, called on behalf of the defendant, after being first duly sworn, testified as follows:

"Direct examination:

"The Witness: I am second mate of the steamship 'Delisle'; I was third mate on the voyage beginning at New York, October 10th, 1928, and going to Boca Grande, and thence to Carteret. I have a master's certificate, and I have been going to sea twenty-four years. I was in the United States Navy twelve years, and I live at 2217 Essex Street, Baltimore.

"Q. How many years have you been a mate on steamers?

"A. Well, let's see—ten years.

"Q. When was the first time you knew that he (referring to Santiago) was sick?

"A. The second morning after leaving Boca Grande.

"Q. How did you find it out?

"A. The captain asked me to go into the forecastle and take his temperature and see what I thought was the matter with him, and I went to see him.

"Q. Did you have a clinical thermometer?

"A. Yes, I had my own. I always carry one.

"Q. And in giving the temperature both of the man and [fol. 151] of the air you used the Fahrenheit scale, did you?

"A. Yes, sir, Fahrenheit.

"Q. And you took your thermometer with you, did you?

"A. Yes, sir.

"Q. And went into the seamen's quarters forward and you found him there, did you?

"A. Yes, sir.

"Q. And what did you find his temperature was?

"A. 104 the first time I took it.

"Q. Didn't you ask him how he felt?

"A. I asked him how he felt and where he felt the worst; the usual questions, you know; if the bowels moved, and all those little things, trying to find out just what was the matter, you know.

"Q. Had you received a training in these matters in your service in the United States Navy?

"A. Why, yes, we had a pretty strict first aid course in the Navy, and then of course we were required to get our license—we have to pass a first aid examination; and I had a little bit of experience myself; in one illness and another I was probably three years in the hospital in the course of my life.

"Q. Were you able to take temperatures and ask these questions and diagnose the troubles that men might have?

"A. Yes, I thought I had a pretty good training in that.

"Q. What did he say in answer to these inquiries you made?

"A. He said that his bowels had moved and that he had pains in his legs and arms and back, and bone pains, and a headache; and his stomach was apparently all right. I tried to find out if he had any sickness in his stomach. He said, no his stomach was all right; he didn't have a stomach

ache or anything like that, but the rest of his body—his head ached, the bones ached, and he started groaning and [fol. 152] turning, and I thought for a while that it was assumed just for effect but he was sick all right; so I went back and told the captain—I said, he has a bad cold, and it may turn into grippe, and I said that that is all that is the matter with him.

"Q. How did his breathing seem to be?

"A. His breathing was easy; no cough or anything that I could see.

"Q. Did he tell you he had any trouble with his breathing?

"A. No, I asked him. I stressed that point. I asked him: Did he have any congestion; did be feel any pain; he said, no, he did not.

"Q. You mean in his chest?

"A. That is the only part of his body he did not complain about, his stomach and his chest.

"Q. He complained about his headache?

"A. He stressed it very much. He said that his head ached all the time.

"Q. Then you went back and reported to the captain, did you?

"A. Yes, sir.

"Q. Then you and the captain, what did you do—did you decide on his treatment?

"A. He looked through the medicine chest to see what he had, and we decided on a physic and quinine as the proper treatment for him.

"Q. What did you decide about his fever?

"A. That it was not too high, not enough to worry about, and that the quinine would probably reduce it, and I personally went and saw that he took his medicine, because the first time he was given medicine he just let it lay and didn't take it, so I went twice a day and made him take his quinine and his physic. He would not take salts so we got him pills, compound cathartic.

"Q. Why wouldn't he take salts?

"A. He said it nauseated him. It seems that the steward [fol. 153] gave him a dose of salts unbeknownst to me and when I wanted to give him salts he refused so I gave him pills. Pills were just as good.

"Q. Did you go forward each day and see that he took these medicines?

"A. Twice a day; sometimes three times a day. He was supposed to take quinine every three hours, and I used to go forward and see that he took his quinine for the night and then I would not see him again until eight o'clock the next morning; three times a day.

"Q. Did you and the captain decide about what food he should have?

"A. Why, yes; the old remedy to starve a fever and feed a cold, or whatever it is; that he should not have any meat or anything heavy, and so I asked the steward if he couldn't fix him up with some nice broths strong enough to be nourishing and not heavy, and he did make special broths for every day.

"Q. What did you give him in the morning?

"A. I don't know; the morning treatment I couldn't say. I know it was not anything to eat that was heavy.

"Q. Do you remember on October 21st whether you saw Santiago on deck at all? That was the day before you arrived.

"A. The day before we arrived, yes, he was out on deck. He walked the full length of the well deck; where he went I don't know but he walked the full length of the well deck, and it is quite a long deck.

"Q. Did he seem to be better that day?

"A. As far as I could see he was all right. He walked firm. I know how I used to be getting up from a fever, I would be dizzy and always getting ready to grab something with my hand, but he didn't seem to be like that. He was not in any condition to work but otherwise he seemed all right. [fol. 154] "Q. Did he smoke any on the voyage up?

"A. Practically every time I went into the forecastle he had a cigarette. He was a heavy smoker; and of course it used to interfere with my taking his temperature because I was taught that after smoking a cigarette or anything you wouldn't get a correct temperature. I would have to stop and wait a few minutes until I thought his mouth was equalized. It never entered my head to forbid the smoking, but I knew smoking was not good for a fever, but I don't think it is so harmful as that.

"Q. Did you see him at any time sitting up in his bunk dressed?

"A. He was always dressed; never undressed; even at midnight he lay in his bunk with his clothes on. I used to try to have him cover up and he would always kick the blankets off. I bawled him out a good many times about that but it was no use, you know.

"Q. What did he have on when he was dressed?

"A. A pair of pants and a shirt; I cannot say what kind of underwear he had on; I didn't look that far; ordinary pair pants, overalls and a shirt, light weight.

"Q. Did you see him any that night when you were at anchor?

"A. No. You say it was the 21st—I can only associate the time with the time of anchoring—the day before, the 20th, was the last time I took his temperature; I thought he was so far improved then that I considered him recovering—I never again saw him and never even knew he went to the hospital until I was told about it. I was surprised to hear he went to the hospital.

"Q. Had you any suspicions that he was dangerously ill at that time?

"A. Why, nothing suggested such a thing. He had been sick but I thought he was better.

[fol. 155] "Q. Did you have such cases before, fever and cold?

"A. Yes, sir.

"Q. Did you give them the same treatment?

"A. Yes, the same treatment.

"Q. With success?

"A. Yes, with success.

"Q. In your opinion was there any necessity of wirelessing to any other ship or trying to put into any port?

"A. No.

"Q. As a matter of fact were there any ports that you could have put into, loaded as you were, when you were coming along the coast of Florida?

"A. No, no port in Florida we could have gone into with the draft we were without going a long ways out of the way to Jacksonville or some place like that.

"Q. How did you find the quarters of the sailors when you went in there, with reference to cleanliness?

"A. I considered, from my experience with ships I considered that they were very good, better than the average ship, dry and clean and light and plenty of ventilation.

"Q. Were they cleaned every day?

"A. Yes, sir, every day.

"Q. And how about the toilet?

"A. The toilet is cleaned the same.

"Q. What can you tell us about whether it was cold or warm coming up?

"A. Why, to the best of my knowledge, we never had a cold day, all warm, nice, really summer weather, of course until the last days before we got in and of course it was autumn but it was very nice, what we call nice weather.

"Q. Take a temperature of sixty—is that cold on a ship?

"A. Oh, heavens, no; that is warm.

"Q. Could you stand steam on in the sailors' quarters?

[fol. 156] "A. It would be uncomfortable; it would be suffocating in there.

"Q. Is it warmer inside than outside?

"A. Always warmer inside.

"Q. What bed clothes did he have?

"A. The usual thing—bedspread, sheet and a blanket.

"Q. Was that sufficient for a man in his condition in that temperature?

"A. Sufficient for anyone; in fact it was too much for him, and he wouldn't keep them on.

"Q. Did he complain of being cold at all, do you know, the day before you got to New York?

"A. No, sir, never did.

"Q. Did he complain of being cold at any time in the quarters there?

"A. Never did.

"Q. You were in there, were you—were you in his quarters the day before you got to New York?

"A. No; the day before that?

"Q. Yes.

"A. That is, the day we arrived and anchored I never went near him. I thought he was well.

"Q. Did you have clear weather coming up?

"A. Clear weather.

"Q. Did you have any damp weather to make the quarters damp at any time?

"A. No; if we had a shower it did not last long. I don't remember any, but if we had one it did not last long. We had an exceptionally clear trip.

"Q. You saw him on deck?

"A. Yes, he was on deck. He walked the length of the well deck, and that is the last I remember seeing him.

"Q. You did not have any conversation with him that time?

"A. Not that day at all. I was on the bridge and looked down and saw him walking the length of the deck.

[fol. 157] "Q. Did you see him the day that he was taken off the ship?

"A. No."

Mr. Rosenberg, reading:

"Q. Do you remember seeing him walk around his quarters the day before you arrived?

"A. No; the day before we arrived I don't remember seeing him at all.

"Q. You don't remember seeing him on deck at all?

"A. Yes; but not in the quarters.

"Q. You anchored at 6:35 in the evening, and that was the 21st?

"A. That is the day that I never went near the man.

"Q. You are sure of that?

"A. Yes, sir; but I saw him.

"Q. Did you see him?

"A. I saw him but I didn't take his temperature that day.

"Q. You are sure of that?

"A. Yes, I am sure of that..

"Q. Can you tell me whose handwriting this is right here in the rough log?

"A. That is mine.

"Q. Will you read what that says?

"A. Santiago's temperature.

"Q. How much?

"A. 103.

"Q. What date is that?

"A. That is the 21st.

"Q. That is the day when the ship anchored at Old Orchard, New Jersey?

"A. Yes, sir.

"Q. That shows that you actually did take it?

"A. I must have taken it although I don't remember taking it.

"Q. You took it at what time on that day?

"A. I always went up about the same time, just before breakfast.

"Q. About eight o'clock in the morning?

"A. Between seven and eight.

[fol. 158] "Q. You are mistaken then in saying you did not take his temperature that morning?

"A. I cannot go beyond that. It is in there (referring to log).

"Mr. Betts: Could you have entered it for someone else?

"The Witness: No; whoever took it would enter it.

"Q. That is your own language and handwriting?

"A. Yes, sir.

"Q. That is Defendant's Exhibit A, the defendant's scrap log; isn't that right?

"A. Yes, sir, the scrap log.

"Q. You wish to change your testimony on that point; is that so?

"A. I think I had better. I cannot go beyond that.

"Q. Can you read this word here (indicating in scrap log)?

"(Witness examines log.)

"A. Moderate breeze.

"Q. Whose initials are those (indicating)?

"A. That is mine (indicating).

"Q. That shows on October 21st you made an entry there?

"A. Yes, sir.

"Q. That there was a moderate breez; isn't that so?

"A. That is right.

"Q. Eight o'clock in the morning?

"A. That is noon, twelve o'clock, when I was going off watch.

"Q. Now, on October 17th the ship was where?

"A. We sailed the 16th, you say?

"Q. Yes.

"A. She would be on the east cost of Florida.

"Q. And close to the shore, wouldn't she?

[fol. 159] "A. Twelve miles out; somewhere between twelve and fifteen miles out.

"Q. Wasn't it easy enough to wireless for a launch to take this man ashore?

"A. That could have been done if it was thought necessary.

"Q. You could have done that until you got away out to sea; isn't that so?

"A. We could have done that most any time that day. You can tell by looking at the log what time we passed Jupiter. That is the last point.

"Q. When did you pass Jupiter?

"(Witness refers to log.)

"A. Seven o'clock or 7:10, something like that. That is about the last point where it would be convenient—Jupiter.

"Q. On Thursday, October 18th, at what time?

"A. 7:10 I believe.

"Q. At that time Santiago's temperature was 104 degrees; isn't that so?

"A. That is right.

"Q. Look at that log and see if that shows his temperature as 104 degrees?

"(Witness refers to log.)

"A. Yes, sir.

"Q. At that time you could have wirelessed for a launch?

"A. Certainly.

"Q. Did you assign any particular seaman to take care of Santiago?

"A. No. The only one that I asked to do anything for him was the steward. The steward saw him more than I did. He used to carry up broths and things.

"Q. Did you help feed Santiago at any time?

"A. I did not help feed him.

[fol. 160] "Q. Did you watch the steward or messboy?

"A. Not every time. A couple of times I saw him given broth, but I did not give it to him.

"Q. On October 22nd, eight A. M. the temperature of Santiago is according to the log book, Defendant's Exhibit 4—it is entered in the log book as 103?

"A. That is right.

"Q. Did you take any steps or anyone else to get a doctor from Carteret to see Santiago that morning, October 22nd?

"A. I did not.

"Q. When did you leave the ship, October 22nd?

"A. Shortly after she docked.

"Q. You went off of her at what time?

"A. Say an hour after she docked I was gone. I did not come back until late that night.

"Q. What time did she dock?

"A. 8:20. I should say I left the ship around 9:30 and did not come back until around ten o'clock.

"Q. You did not bathe the man with alcohol or anything of that sort while he was sick, did you?

"A. No, sir.

"Q. Although he was wearing his clothes, not only his underwear but his clothes in general; isn't that so?

"A. He had on his outside clothes.

"Q. And nothing was done about that; isn't that so?

"A. No.

"Q. He was perspiring quite a lot, wasn't he? With a temperature of 104 degrees would you say that a man would perspire quite a lot?

"A. I guess he was.

"Q. Nothing was done about changing his garments or bedding during all the time he was ill; isn't that so?

"A. That is right, because he was able to do all those things for himself.

"Q. He was a slight fellow and did not appear to have [fol. 161] a rugged constitution; is that so; yes or no?

"A. Yes, he had a rugged constitution.

"Q. Are there any Marine Hospitals that you know of around Florida?

"A. Oh, yes, there is a Marine Hospital in Tampa, but there is none in Boca Grande.

"Q. After you leave Boca Grande what ports do you pass?

"A. Key West, Miami, and then the next—then Hampton Roads; that is the nearest.

"Q. There are hospitals in those places?

"A. There are hospitals but no Marine Hospitals. There is no Marine Hospital.

"Q. Is there a Marine Hospital in Jacksonville?

"A. Yes.

"Q. This man, as a matter of fact, was near death, wasn't he?

"A. Yes, but no one knew it.

"Q. What was the course that you took? What was the course that you took from Boca Grande? What course would you call the course that you took?

"A. Well, there is no particular name for it. There is only one way to come up, up through the Gulf Stream and Straits of Florida.

"Q. Through the Gulf Stream and Straits of Florida?

"A. Yes.

"Q. And do you designate your course in the log book, as to the nature of the course?

"A. It is given in degrees, each watch that you steer, but that does not mean anything.

"Q. And the log shows just what particular course you were taking?

"A. You make a course—you go south and you turn, and you go north again. The best way to describe it is that you follow the Gulf Stream all the way to Cape Hatteras.

"Q. Do many ships favor that course?

"A. Northbound ships all take it; southbound ships, they come in towards the coast and offshore to detach the Gulf [fol. 162] Stream and avoid the current."

Mr. Rosenberg:

"Q. The captain said he was a sallow looking fellow is that so?

"A. Do you mean a sallow unhealthy look?

"Q. Yes.

"A. No, I would not consider him unhealthy looking. I'll tell you—all of those people are more or less, to my way of thinking, they are not of a rugged build; they are all of a delicate build; it is a racial characteristic. They may be ill and you don't notice it; they all look more or less alike; they are very delicate looking.

"Q. He looked delicate; isn't that so?

"A. From our standards, yes.

"Redirect examination:

"Q. In your opinion would it be feasible to put him off the ship's side in a launch ten miles to shore to take him to some nearby harbor?

"A. Do you want my thoughts at that time or now?

"Q. At that time?

"A. At that time I did not think it would benefit him in the least to go anyway until such time as he could be gotten to a Marine Hospital where he could get proper attention. I didn't think it would do him a bit of good, or do him any harm as far as appearances went, for he could have walked; if possible, he could have walked to the nearest doctor. In my judgment, he was able to take care of himself to that extent.

"Q. Did you notice when you saw him in his bed that he was perspiring at all?

[fol. 163] "A. Well, of course, he was perspiring slightly. We used to have quite some arguments because he would not keep his blankets on. My idea was for him to sweat that fever out. Quinine would make him sweat and he wouldn't keep the cover up. I asked the sailors if they noticed him during the night to cover him up, not to let him catch cold, but whether he kept covered or not I don't know. He was perspiring to some extent but not perspiring like anybody would with a temperature. His forehead would be damp."

Mr. Crawford:

"Q. Well, you pass Jacksonville?

"A. We pass it, just the same as we pass Chicago, a long ways off.

"Q. Jacksonville is in Florida?

"A. But it is not in the path of the ship. I should say it was one hundred and fifty miles out of the direct line of the ship; but that is just a statement; that is not exactly accurate.

"Q. Did you try his pulse at all?

"A. Every time I took his temperature.

"Q. How did you find his pulse?

"A. I found it high, but not too rapid, you know.

"Q. Any more than you would expect with that temperature?

"A. As I would expect with that.

"Q. Did it seem to be firm?

"A. A strong pulse but a little rapid.

"Q. Did you try his respiration?

"A. Yes, every time I took his temperature.

"Q. How did you find that?

"A. Normal. His respiration was normal."

[fol. 164] Dr. HORACE S. BALDWIN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Dr. Baldwin, you are a physician licensed to practice in this State?

A. I am.

Q. And when were you admitted to practice?

A. I was admitted to practice in June, 1921.

Q. Of what medical school are you a graduate?

A. Cornell University Medical College.

Q. Suppose you just tell us your particular training in pneumonia cases, Doctor?

A. After my interneship at the New York Hospital I went to Bellevue Hospital, and spent four years studying pneumonia, doing research work in that disease, and particularly investigating modes of therapy—particularly serum therapy in pneumonia. During that time I saw at Bellevue Hospital at least one thousand cases. After I left Bellevue I went to the New York Hospital, where I have had charge of the specific treatment—serum treatment and oxygen treatment of lobar pneumonia——

Q. Doctor, has your practice during the last years been to specialize in pneumonia cases, in addition to what you have already told us?

A. Yes.

Q. And how many cases of pneumonia would you say you have handled in a period of years?

A. About two hundred cases within this last year.

Q. Are you familiar with the various types of pneumonia?

A. Yes, I am.

Q. Will you tell the jury very briefly what those types are?

[fol. 165] A. Do you mean the bacteriological classification or pathological classification?

Q. I mean the types that you determine from an examination of the sputum?

A. Well, that is bacteriological.

Q. All right.

A. You classify lobar pneumonia that way, according to the organism or bateria that causes the infection in the

lung; and, in general, there are two classes of organisms that cause lobar pneumonia: the pneumococcus and Friedlander bacillus.

Q. In which of those two types is the use of serum recommended, and generally used?

A. The use of serum is recommended, and has some general use in two types of pneumococcus: type 1 and type 2. There is no serum for the treatment of Friedlander bacillus pneumonia.

Q. Is serum ever given in a Friedlander type of case?

A. No.

Q. Now, suppose that the diagnosis of this case was that this was the Friedlander type of lobar pneumonia: in that case would it have been any use to give this plaintiff in this case—a 17-year-old Porto Rican—the serum treatment?

A. No, sir.

Q. Now, during your experience with many cases of this Friedlander type, what is the recognized percentage of fatality?

A. In general—I can state in general terms that the mortality in Friedlander pneumonia is very high. It runs at least 70 to 90 per cent, depending a little bit upon age, exposure, and so forth.

Q. That is higher than other types of pneumonia, is it?

A. Yes. The average mortality of the other type is about 33 per cent in hospital practice; and I assume that [fol. 166] on the outside it is pretty nearly the same, but statistics are not available outside.

Q. In this type of Friedlander pneumonia the fatality is almost twice as high or the percentage of fatality is almost twice as high——

A. (Interposing.) Oh, yes.

Q. Have you had any experience in hospitals or elsewhere with the treatment of Porto Ricans suffering from pneumonia?

A. When I was at Bellevue, and also at New York Hospital we see a number of cases of pneumonia in Porto Ricans, yes.

Q. Please describe the results of your experience with Porto Rican patients suffering from pneumonia?

A. Porto Ricans and, in general, the southern races do not do as well with lobar pneumonia as do the northern races.

Q. Now, assume, doctor, that the plaintiff's intestate in this case, a young Porto Rican, named Santiago, sailed on board a steamer, and was observed to be feverish on the evening of October 16, 1928; and on the morning of the 17th also; and that he had a fever of 104 degrees at 5:45 in the afternoon of the 17th of October, and at this time the vessel on which he was a sailor was off the coast of Florida; that the temperature of the atmosphere at that time was around 80 degrees or higher, and that he had other symptoms, including a very severe headache with bones aching, pains in the arms, legs and back; that he had a cough; that he was delirious; that he was given quinine and salts and castor oil;; that his fever at midnight on the 17th of October was reduced to 102 degrees; that it was again 104 degrees in the morning of the 18th, and that [fol. 167] it continued at 103 degrees from then on whenever it was taken, and that it was taken at least once a day for the rest of the voyage; and assuming further that the ship arrived in lower New York harbor at about 6 P. M. October 21, and that this sailor was put ashore and in an ambulance about 4:30 P. M. on the afternoon of the next day, October 22; and that he died in the Staten Island Marine Hospital at 8:45 A. M. on the morning of October 23rd; and assume further that the diagnosis at the hospital was lobar pneumonia in both lower and the right middle lobes, and that the type of bacillus was Friedlander; can you state with reasonable certainty when this pneumonia condition began?

A. I would say with reasonable certainty on October 17th.

Q. Now, assuming, doctor, in addition to all of the foregoing facts, that Santiago was seen to spit up blood in coughing, described by the witnesses as real red blood; that in the Marine Hospital a pleuretic rub was obtained upon examination, indicating pleurisy accompanying or preceding the pneumonia, could you state with reasonable certainty whether those two additional factors, or either of them denoted the existence of any particular type of pneumonia?

A. No; those conditions might very well be found in the pneumococcus type of pneumonia and also the Friedlander bacillus. The noting of spitting up sputum or blood is particularly found in the Friedlander bacillus pneumonia, how-

ever. That is one of the rather striking characteristics of that type of pneumonia.

Q. Then, that would be one of the symptoms which would tend to determine that this was a case of Friedlander pneumonia, would it?

[fol. 168] A. Well, that together with an examination of the sputum, yes.

Q. Now, assuming the existence of the Friedlander type bacillus in this case, can you state with reasonable certainty from your experience and from your studies what the chances of recovery were for Santiago, this 17-year-old boy, in this case, if he had been placed in an adequate hospital on the 18th of October, the day after his high temperature was discovered, and the day after he first reported sick?

A. I would say that, at best, they were only three out of ten.

Q. Doctor, would you expect a non-medical man, a ship's officer, with only first aid experience and training, to be able to distinguish between pneumonia, malarial fever, or croup from the symptoms which I have outlined to you, as obtaining on the first and second days that this man was sick?

A. Well, that is a hard question to answer, but in general a layman has a good bit of difficulty in applying a name to a condition such as that.

Q. Are some of those symptoms which I have given you symptoms of malarial fever as well as symptoms of pneumonia?

A. Well, occasionally they will have spitting of blood in malaria, but not very often. However, I do not think a layman would be qualified to——

Mr. Rosenberg (interposing): I object to this. I object to the question on the ground that this officer or the officers on board this ship were not "laymen" in the ordinary sense. They had taken the first aid examination, as the testimony shows, in medicine, and had more than a lay-

[fol. 169] man's knowledge of diseases and drugs and medicines, I submit.

The Court: I think that is true. The doctor is just testifying to what an ordinary layman might know. Of course, a nurse might know more, although not a fully qualified

doctor. A ship's officer, I suppose, occupies a status somewhere in between that of a layman and a doctor. He is supposed to have had a first aid course, and to know a little more than maybe I do. You may answer.

The Witness: I would say this: that a ship making a southern stop with a sick Porto Rican in the crew sick, the very logical thing to do would be to give quinine, because, after all, if he had pneumonia the treatment would consist of keeping him quiet and giving him plenty of fluids and so forth. Now, quinine is a specific for malaria, and I should say that it was quite reasonable to go ahead and give the man quinine, because if the man did have malaria it was a very good drug for him. If he had pneumonia, quinine is a recognized drug in the treatment of pneumonia also.

Q. Assume that the treatment administered was to give quinine in daily doses to this sick man, and assume that he had a purge on the first day of his illness, and thereafter cathartic pills daily; that he was placed on a light diet of soup and orange juice, and kept in a room with open port holes, with the outside temperature ranging from 88 to 72 degrees on the first three days, beginning with the 17th of October, and thereafter from 78 degrees at noon [fol. 170] to 60 degrees at midnight, and that a blanket was provided in addition to his clothes which he kept on at all times, would you say that was ordinarily good treatment by an officer aboard a ship, without hospital or medical training?

A. I would.

Q. Doctor, in your opinion, would the leaking of salt water into the room where this patient lay, which leakage was mopped up from time to time by other sailors, have any effect upon the course of his disease?

A. I would say "no".

Mr. Crawford: That is all.

Cross-examination.

By Mr. Rosenberg:

Q. Doctor, you never saw Victor Manuel Santiago, did you?

A. I did not.

Q. Assuming that a physician who is a graduate of the University of Louisville, Kentucky, and who had been in the public health service, and was executive officer in the United States Marine Hospital at Staten Island in October, 1928, and as executive officer, he had treated from 60 to 80 patients with pneumonia during a year, and that this executive officer had examined this man, Victor Manuel Santiago, and that he had examined him on October 22nd—the evening of October 22nd, and that he treated him and supervised his treatment, and made a diagnosis of his case, and that this man died, after being treated by him, on the following morning at about eight o'clock A. M.; assuming those to be the facts, and that that doctor testified that he could say with reasonable certainty that if that man had been given proper medical attention by the officers, [fol. 171] that his chance of surviving would have been greater than his chance of dying, assuming that to be true, would you disagree with the statement of that doctor?

A. I would accept his statement with great respect.

Q. Now, doctor, do you know of the Hygiene Laboratory of the Public Health Service of the United States?

A. Oh, yes, very well.

Q. Is that a very efficient branch of the United States Government?

A. Yes, indeed.

Q. And it is very efficient in its medical service, is it?

A. I am acquainted with it in its research service.

Q. And is its research service very efficient?

A. Oh, yes.

Q. And are the doctors who work in the United States marine hospitals, do you know as matter of fact whether they work under the rules and regulations of that Hygiene Laboratory Service, yes or no?

A. The doctors that work where?

Q. In the United States Marine Hospital Service.

A. I don't know whether they have much responsibility for the Hygiene Laboratory or not.

Q. Does the Hygiene Laboratory of the Public Health Service make researches in connection with the use of serums in pneumonia cases?

A. Yes, indeed. I did some work in conjunction with them.

Q. And that is a very effective part of that service, is not that so?

A. Yes.

Q. And they prescribe or they recommend serums in certain cases, do they not?

A. I could not say that they do recommend them. In fact, I have—McCoy, who is the head of that service, I think he still has an open mind on that subject.

Q. Does that service recommend serums to be used in [fol. 172] any case of pneumonia or not?

A. Oh, they do not recommend its use in any case of pneumonia, no.

Q. Doctor, outside of pneumonia, if a man on board a ship had a temperature of 104 degrees, whether he was a Porto Rican or someone else, would you consider his condition serious?

A. Not because of the 104 degrees temperature per se.

Q. Let us say that his temperature was 104 degrees, and later was 103, and once was 102, and then persisted for several days at 103, would you then consider his condition serious?

A. As a doctor, just because he had a temperature of 103 or 104 I would not state the opinion that he was necessarily seriously ill.

Q. Would that be a sign of danger?

A. Of course it would be a sign—evidence. It would be a factor in the observation of the case that would justify——

Q. (Interposing.) Just on those facts alone; assuming a man to have a temperature of 104 degrees on two different days, and then 103 degrees temperature on other days—and once 102, would you on those signs alone consider that dangerous?

A. Not necessarily dangerous—to life, do you mean?

Q. Say that in addition to that he was coughing and spitting blood, and his bones were aching, and he was delirious, would that indicate any danger to you?

A. Oh, yes. Yes, it would indicate that the man was very seriously ill.

Q. And if you were on board a ship, and were not a physician, would you, as a layman, make any attempt to obtain medical aid if it were available?

A. Why, I think that is a perfectly natural thing to do, yes.

[fol. 173] Q. If you were more than a layman—assuming you were an officer, and had a knowledge of first aid and some knowledge of drugs, that goes with the examination that is given to officers on ships, would not that indicate to you that it was very important to obtain medical assistance—outside medical assistance?

A. It is very hard to disengage one's self from one's professional point of view.

Q. Yes?

A. But naturally if I were a layman and there was a doctor on board the ship, I would certainly ask the doctor to see such a patient.

Q. If you were not a layman, but say that you were a ship's officer, and that there was no doctor on the ship, and the Coast Guard Service were available, and you were passing certain cities or certain ports, going along the coast of Florida, would you, as a reasonable man, expect that ship's officer or officers to obtain technical skill or medical skill if they could obtain it, yes or no, Doctor?

A. I really—that is a very speculative question. I doubt very much whether a captain of a ship would take his boat to port——

Q. (Interposing.) Assuming that he did not have to take his boat to port, but assuming that he was passing other ships, some of them passenger ships, and that Coast Guard ships were available, or assuming that he had a wireless, or assuming that he could have put that man on another ship with a launch, or something of that sort, would you expect the officers of the ship to keep that man on board under those circumstances?

A. Well, I should think that—the answer to a question like that is that if it were very easy to get that man on board another ship, and get medical help, I would expect them to do it, if they realized the situation.

[fol. 174] Q. Not whether they realized the situation, but I am assuming that he was a reasonable man—we do not know whether he was stupid or intelligent, but as a reasonable man would you expect him to get expert medical attention for that man?

A. I assume that if he were extra solicitous of his crew, he would get aid.

Q. No, I am not saying that this captain was extra solicitous. I want to know whether as a reasonable man you would expect him to get expert medical attention for that man? That is an easy question, yes or no, Doctor.

A. No, it is not so easy to answer, because there are a great many other things there——

Q. (Interposing.) Oh, no, there are not.

A. If help was easily accessible, and other things being equal, I would answer the question "yes".

Q. Now, if there were a hospital room on that ship, would you expect the officers of that ship to put that man into that hospital room?

A. Yes.

Q. And if they did not do so, it would be carelessness, would it not?

A. To a certain degree I would say it was, yes.

Q. Now, if there were port holes in the forecastle, and if that ship was making headway, and if there were a breeze blowing through the portholes, and if this man was lying in his bunk sick, under the conditions that I have stated, would you say that that would be a proper way of keeping that man?

A. With the portholes open?

Q. Yes.

A. Oh, yes.

Q. Even though you had a breeze?

A. Yes.

Q. What would you use for the man in the nature of coverings under those circumstances?

A. A sheet and a blanket. Certainly not much more, [fol. 175] under those temperature conditions, and with his fever.

Q. Assuming that the temperature outside was 60 degrees, and that the ship was making headway, and your portholes were open, out at sea, what would you expect that man to have in the nature of coverings?

A. A blanket and a sheet.

Q. Is that all?

A. It would not be reasonable that he should have very much more in the way of covering. He was delirious at the time, and had a lot of fever. He would not want much cover.

Q. Would you expect that man to have, under those conditions—assuming him to be delirious, as you have said—would you expect him to have an attendant near him at all times or not?

A. I would assume that he would have somebody who was looking after him quite frequently.

Q. All the time?

A. I would not necessarily assume he had a man in his room every minute of the time.

Q. How often should a man be there?

A. I should say a man should have stepped in to have seen him about four times in the morning and four times in the afternoon.

Q. And what do you think would happen to a delirious person if he had only one blanket and a sheet on him, and if he was, as has been testified, crazy or delirious? Do you think he would keep the sheet and blanket on him during all times?

A. No, he would have a tendency to kick those things off.

Q. If that was so, would it not be necessary to have an attendant near that man all the time, under those circumstances?

A. Most delirious patients, sick like that, are asleep, and then they mutter in their delirium. They are not delirious [fol. 176] all the time, trying to get out of bed. I would not consider it necessary to have a man there all the time.

Q. You would not?

A. No.

Q. Have you ever been on board a ship?

A. Yes.

Q. Have you ever sailed on board a ship as a doctor?

A. No, I have not.

Q. Your experience has been largely in hospitals or in private practice?

A. In hospitals and in private practice, yes.

Q. And in hospitals, of course, there is a nurse always available in case blankets do get off?

A. Yes.

Q. I mean there is a nurse in the ward, is not that so?

A. Yes.

Q. And if a pneumonia patient should throw off his blankets, that condition would be easily remedied promptly in a hospital, is not that so?

A. It is hard to keep blankets on certain types of delirious patients with pneumonia, at times.

Q. You said something about salt water not being harmful. Is dampness harmful to a patient suffering with pneumonia?

A. I really doubt very much if it is.

Q. Well, would you rather have the conditions dry or wet about a pneumonia patient?

A. I would rather have it a nice, dry room.

Q. That would be the proper treatment, would it not?

A. Of course, that would be the better way to treat pneumonia.

Q. And if you saw somebody treating him in any other manner, you would consider that person careless, would you not?

A. If it could be avoided, of course.

Q. If it could be avoided?

A. Yes.

[fol. 177] Q. Now, in your pneumonia cases do you recommend the use of quinine?

A. Personally I do not use much quinine. Quinine has quite a vogue amongst certain pneumonia specialists.

Q. But quinine tends to—is quinine used more in malaria than in pneumonia?

A. Yes, it is.

Q. From your point of view, quinine is a proper medicine to be used in cases of malaria rather than pneumonia, is not that so? I mean comparing the two conditions?

A. Yes.

Q. What would you use, in case a person were suffering from pneumonia, to regulate the temperature?

A. I do not use any drugs to keep down the temperature in pneumonia.

Q. You do not?

A. If a patient has a temperature of 105, we put an ice bag on the head.

Q. What other things do you do? State what you do in the treatment of a pneumonia patient, Doctor?

A. Those things all vary, pneumonia being—some patients have different symptoms.

Q. Assuming the patient to have the symptoms that I have indicated in this case, what would your treatment be?

A. My treatment would be to keep the man in bed, keep him quiet.

Q. Would you use any sedatives to keep him quiet?

A. I would give him a little codine, if it seemed to be indicated—a little luminal or bromide.

Q. What else would you do in the treatment, Doctor?

A. I mentioned fluids, giving him water. You would watch out for a distension of his abdomen. You would give him a little physic to keep his bowels open.

Q. How often would you give him physic?

A. Oh, I should think—we give physics maybe once every other day or so. Some doctors never give a physic; other [fol. 178] doctors give a great deal. I sort of steer a middle course myself.

Q. What else would you do?

A. The other treatment, with digitalis, depends a great deal on what happens.

Q. Assuming the patient to be in the condition I have stated——

A. (Interposing.) Assuming that, that is about really all you could do.

Q. And what sort of nursing?

A. That all comes under nursing; giving him food and keeping him quiet.

Q. Outside of the administering of drugs, what sort of care would you give him?

A. Well, baths—sponge baths.

Q. How often would you do that?

A. Well, if that sort of thing disturbed the man, you would do it only once a day. If he had a temperature of 105, you would give him a sponge bath maybe two or three times a day.

Q. If he had a temperature of 104, how many times a day?

A. If his pulse was bad, I would not bother him with bathing him more than once a day.

Q. Is there anything else you would do for the patient?

A. Of course, one of the things that we would do, having facilities available, you would examine the sputum to find out what type of pneumonia it was, in order to find out if you should give him a serum that would be useful, or if possible give him oxygen, if he was very deeply blue.

Q. Now, Doctor, you are testifying in this case as an expert only, is not that so?

A. Yes.

Q. And not as one having seen the patient?

A. No.

Q. When did you first know about this case?

[fol. 179] A. Yesterday afternoon—beg pardon. No; the afternoon before yesterday, Tuesday.

Q. And you have been told—you have been promised a fee for coming here?

A. I have not been promised a fee; but I expect to get a fee.

A Juror: Is a sustained temperature of 105 over a period of several days generally fatal?

The Witness: Not generally, no.

A Juror: Is a temperature of 106 considered absolutely fatal?

The Witness: No, not of itself. In cases of typhoid fever they have it.

The Court: You mean in pneumonia cases?

A Juror: Yes, in this particular pneumonia case.

The Witness: You see, the layman has the impression that the temperature is the whole sum and substance of the disease. A fever is very often a favorable sign. In the aged and people who are very much debilitated, they do not have any temperature. A temperature of 106 over a period of days is very alarming.

A Juror: Applying it to this particular case——

The Witness (interposing): A temperature of 105 or 106 over a number of days is very alarming.

By Mr. Rosenberg:

Q. Doctor, if the hospital record in this man's case shows a temperature of 104 when he was admitted to the hospital, and a few hours before he died, would that indicate to you [fol. 180] anything as to the seriousness of the high temperature in connection with his case?

A. The 104 degrees of temperature does not indicate anything with regard to the seriousness of his case.

Q. That indicates to you, however, since he died shortly after that time, that the high temperature never rose to more than 104 degrees, is not that so?

A. Oh, no, it does not indicate that at all.

Q. It does not?

A. No.

Q. But temperature is one of the important signs in connection with determining whether a patient is seriously sick or not, is it not? It is one of the important signs?

A. One of the signs, yes.

Q. It is one of the important signs, is it not, yes or no?

A. In cases of pneumonia 66⅔ per cent of the pneumococcus cases get well, and they have a temperature of 104. They expect to have a temperature of 104 in any case of pneumonia. That is not necessarily the thing that makes you think a man is not going to get well.

Q. If a ship's officer had a man on board, and his temperature were 104 and 103, varying between that, would you say, as a reasonable man, that that was an alarming sign?

A. No, not to a doctor.

Q. No, but to a ship's officer?

A. I don't think a reasonably-minded ship's officer would think that a temperature of 104, of itself, would necessarily be greatly alarming.

Q. Well, would it be serious?

A. It might, and it might not.

Q. Well, if he were gasping and his lips were blue, would that make a difference?

A. Oh, yes.

Q. Then it would be serious, would it not?

A. I should think the ordinary layman would become [fol. 181] alarmed or apprehensive about a man, if he had those conditions.

Q. And a ship's officer would be too?

A. Yes, I think so.

Q. Do people with tender, diseased or bleeding gums spit red blood?

A. Oh, surely they do. Occasionally they will.

Q. Is the spitting of "prune juice" sputum or blood-tinged *with* sputum a sign of pneumonia?

A. Blood-tinged sputum is not a sign of pneumonia. "Prune juice" sputum is very typically a sign of pneumonia, yes.

Q. Can you tell me whether in tuberculosis cases the temperature is more uneven than it is in pneumonia cases?

A. In general, it is, but with tuberculosis pneumonia the temperature is very often on a level.

Q. Is tubercular pneumonia fatal?

A. Not absolutely, no.

Mr. Rosenberg: That is all.

Redirect examination.

By Mr. Crawford:

Q. Doctor, assume that this physician at the Marine Hospital, who diagnosed this case, in addition to all that was said about him by Mr. Rosenberg, was a young man admitted to practice in Kentucky in 1926, admitted to practice in New York only in 1929, and further that he testified as follows, at page 9 of his deposition (reading):

"Q. This pneumococcus bacillus of Friedlander, tell us about that so that a layman can understand what it is all about.

"A. The pneumococcus bacillus is the positive organism of lobar pneumonia.

"Q. Is it a germ?

"A. It is considered as bacteria of pathological nature—[fol. 182] I think I have made an error.

"Q. If you have, it is not too late to correct it.

"A. It is a pneumococcus organism—it is hard to remember all this pathological stuff, I guess you had better strike out 'bacillus' all through—it is a pneumococcus, a coccus type of bacillus which causes a typical growth on the blood agar."

And further that he testified at page 36, on cross examination, as follows (reading):

"Q. This serum treatment in cases of pneumonia that you spoke of, is that universally given in cases of pneumonia today?

"A. Any physician who understands pneumonia at all recognizes the value of pneumonia serum, in fact statistics show it cuts mortality 33 per cent, over a series of thousands of cases."

Now, with that in mind, doctor, would you say that this doctor, Dr. Kienzle, was an expert in pneumonia?

A. Well, of course not, I would not say he was an expert in pneumonia from that.

Q. Those facts do not indicate that Dr. Kienzle knew very much about pneumonia—what he has testified?

A. It would indicate that he knew very little about the bacteriology of pneumonia, and the specific treatment of pneumonia.

Q. Is it possible medically to say whether Santiago's death was due in this case to a failure to obtain hospital treatment or because of the natural course and fatal nature of this disease from which he was suffering, namely, pneumonia of the Friedlander type?

A. From my knowledge of what happened here, I would think that the man's death was pre-destined at the time he was taken ill aboard the ship.

Mr. Crawford: That is all.

[fol. 183] Recross-examination.

By Mr. Rosenberg:

Q. You are testifying to that as an expert?

A. Yes.

Q. An expert called to court?

A. Yes.

Q. You did not see this man?

A. No.

Q. But the man who testified did?

A. Yes.

Q. Does that make a difference to you?

A. Yes, of course that makes a difference.

Q. That makes a difference?

A. Yes.

Q. And if this man who testified——

A. (Interposing.) There are really some very important things there to consider, though.

The Witness: The causative organism—the fact that the man had Friedlander bacilli is to my mind very very important in the prognosis—the fact that he died. An ordinary doctor who is not particularly interested in the bacteriological findings of pneumonia, would not know the ominousness of that fact, unless he had the sputum examined and recognized it.

Q. If this doctor who testified also testified that at a time previous to his testimony he was examining for the Stand-

ard Oil Company three hundred men a month on an average, would you consider that good medical experience?

A. Oh, yes.

Q. And would you say that that man had a reasonable knowledge of medicine?

A. Yes.

Q. And if he had treated sixty to eighty cases of pneumonia a year in the Marine Hospital, as the executive officer there, would that indicate anything to you?

A. It would indicate that, as a general practitioner, he had had good experience.

[fol. 184] Dr. NELSON W. CORNELL, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Crawford:

Q. Doctor, you are a physician licensed to practice in this State?

A. Yes.

Q. And when were you admitted to practice?

A. 1921.

Q. Will you state briefly, Doctor, what your experience in the practice of medicine has been since that time?

A. At the present time I am assistant attending surgeon at the New York Hospital, and instructor in surgery at the Cornell University Medical College.

Q. Have you also had work in general practice?

A. Yes.

Q. Including the treatment of pneumonia cases?

A. Yes.

Q. Now, Doctor, from your personal experience and your study, are you familiar with the various types of lobar pneumonia?

A. Yes.

Q. Will you state what those types are?

A. There are four types, types 1, 2, 3 and 4.

Q. Is one of those types known as Friedlander bacillus?

A. Yes.

Q. Will you tell the jury whether there is any difference in the degree of mortality in these various types of pneumonia?

A. Yes, in type 1 the mortality is from 25 to 35 per cent. In type 2, 35 to 40. In type 3 (that is the one in which Friedlander is included) the mortality is very high, given between 70 to 90 per cent. Type 4 is the least fatal of all.

Q. You are familiar with this serum treatment that is used in certain cases of pneumonia?

A. Yes.

[fol. 185] Q. Is it always necessary to determine the type of pneumonia before giving the serum treatment?

A. Yes.

Q. Have you knowledge as to whether this serum treatment is given in connection with all types or certain types?

A. Just certain types.

Q. What types is it given in connection with?

A. It is given in type 1. That is recognized by the American Medical Association. That is the only recognized serum at the present time.

Q. In the course of all your experience, have you ever heard of serum being given in type 3, the Friedlander bacillus?

A. No.

Q. Is there any serum given for that Friedlander type?

A. No.

Q. Do you know of any hospital in this country where serum is given in this Friedlander type of pneumonia?

A. No.

Q. With the best hospital treatment, what are the chances of recovery of a man infected with this Friedlander type of lobar pneumonia?

A. His chances are 70 to 90 of not getting well.

Q. It is from one to three chances out of ten that the man can recover?

A. Yes, sir.

Cross-examination.

By Mr. Rosenberg:

Q. When did you first become acquainted with this case?

A. Two days ago.

Q. Do you specialize in any pneumonia cases?

A. No.

Q. How many pneumonia cases do you handle a year?

A. I should say on an average of ten to twelve a year.

Q. Ten to twelve a year?

A. Yes.

Q. What is your specialty, Doctor?

A. Surgery.

[fol. 186] Q. Are there three stages in the getting and developing of pneumonia?

A. Yes.

Q. What are those three stages?

A. The first stage is the stage known as engorgement of the lung, the second stage is known as red hepatization, the third stage is gray hepatization. Those are the three stages, interpreted pathologically, of pneumonia, lobar pneumonia.

Q. That is true of any pneumonia case?

A. Just lobar.

Q. If this was a lobar pneumonia case, of course, it would be true in this case?

A. Yes. Of course, there are some typical cases, but that is the usual infection.

Q. Did you ever hear of serum being used in a lobar pneumonia case?

A. Oh, yes.

Q. Don't some physicians make a practice of giving serum in any type of lobar pneumonia case?

A. Not that I know of. I do not know of any physician that does that.

Q. If the United States Government hospitals used that method in treating lobar pneumonia patients, would you object to it?

A. I would.

Q. You would?

A. Yes.

Q. Do you say that after the first stage of pneumonia is developed, any kind of case of lobar, a man has not a fair chance of recovery from it, provided he is given proper medical attention?

A. Yes, the form and the percentages that I quoted at the beginning.

Q. Your answer is yes?

A. Yes.

Q. What happens in the third stage? You would call it what?

A. Gray hepatization.

Q. Is that sometimes called a consolidation?

A. Yes, that is, but the second stage is a consolidation, but dry. The third stage is still a consolidation but the lung is wet.

[fol. 187] Q. When the third stage does take place, it is hopeless to give a man serum at that time?

A. No.

Q. You say you would give serum at that time?

A. In certain types.

Q. It would not be as effective as if it were given earlier?

A. That is a debatable question.

Q. That is a debatable question?

A. Yes, sir.

Q. If he was graduated from a university and in the course of time he had become executive officer of the United States Marine Hospital at Staten Island and was treating there from sixty to eighty cases of pneumonia cases a year, and assuming that this particular doctor had examined this deceased person, and that the man was brought into the hospital and stayed there from about six o'clock P. M. to eight-thirty the following morning, and that this doctor supervised the treatment and knew all about his case, and assume that the said doctor is now employed by the Standard Oil Company of New York and handles three hundred men a month in his work, medical work, assuming that to be so, and he also testified that having seen the man himself and treated the man, he could say with reasonable certainty that that man had a fair chance of surviving, would you dare to disagree with that man? Would you disagree with that man?

A. Might I say that superficially, on what you have given, the man should be competent to make the statement in the case. That is what I can answer.

Q. You think he would be competent. Does it make any difference, does the fact that he was graduated from the [fol. 188] University of Louisville in 1926 make any difference, in your opinion?

A. He has less experience, of course.

Q. But, Doctor, you have how many cases of pneumonia a year?

A. I see ten to twelve a year.

Q. Ten to twelve a year?
A. Yes.
Q. It takes you several years to see eighty cases?
A. Yes.
Q. And experience is an important thing, you admit that?
A. Yes.

Mr. Rosenberg: That is all.

Redirect examination.

By Mr. Crawford:

Q. Would it change your opinion of this man, Dr. Kienzle, in judging this case of pneumonia if his testimony should make no distinction between the various types of pneumonia and that serum was given universally in all cases? Would that affect your opinion?
A. Yes.
Q. What would that condition of facts lead you to say about this man's judgment in this case?
A. I would say if he made no mention of the different types of pneumonia, he is rather unfamiliar with the scientific aspect of pneumonia, and the serum treatment of pneumonia depends upon the condition or the type of pneumonia. If this serum is given at random it might even work harm to the patient, because they get a severe reaction on temperature and pulse rate and so forth, so that it is very necessary, I feel, it is very necessary to find out whether you have got a type that is worth while treating with serum.
Q. That is usually done in the hospital, as to the type of pneumonia?
A. Yes.
Q. If this doctor further testified as follows:

[fol. 189] "Q. This pneumococcus bacillus of Friedlander, tell us about that so that a layman can understand what it is all about.
"A. The pneumococcus bacillus is the positive organism of lobar pneumonia.
"Q. Is it a germ?
"A. It is considered as bacteria of pathological nature—I think I have made an error.
"Q. If you have, it is not too late to correct it.

"A. It is a pneumococcus organism—it is hard to remember all this pathological stuff, I guess you had better strike out 'bacillus' all through—it is a pneumococcus, a coccus type of bacillus which causes a typical growth on the blood agar."

If he has so testified in this trial would that confirm your opinion as to his knowledge of the pathological nature of pneumonia?

A. It would tend to, yes.

Mr. Crawford: That is all.

Recross-examination.

By Mr. Rosenberg:

Q. Have you been subpœnaed down here to court, Doctor?
A. No, I was asked to come by Mr. Crawford.
Q. And you have been promised to be paid for testifying?
A. No, I have not been promised.
Q. You expect to be?
A. They usually do pay us.
Q. And you testify for plaintiffs and defendants, sometimes?
A. Yes, sir.
Q. Do you testify often?
A. No.
Q. But you examine cases, examine persons injured in negligence cases, often for the purpose of testimony?
A. For the purpose of examination.
[fol. 190] Q. And for the purpose of testimony, if testimony is necessary?
A. If testimony is necessary.
Q. If the case is not settled?
A. Yes.

Redirect examination.

By Mr. Crawford:

Q. Do you know Dr. Horace Baldwin?
A. Yes.
Q. Will you tell the Court and jury whether he is considered an authority on pneumonia?
A. Yes, he is.

Mr. Crawford: That is all.

Mr. Crawford, reading deposition:

"RUPERT FIELDING, a witness of lawful age, called on behalf of the defendant, after being first duly sworn, testified as follows:

"Direct examination:

"Q. And were you steward on the 'Delisle' in October, 1928?

"A. I was.

"Q. And how long have you been going to sea?

"A. About twenty-five years.

"Q. Do you remember this voyage in October, 1928, from Boca Grande, Florida, to Carteret, New Jersey?

"A. Yes, I do.

"Q. Do you remember an ordinary seaman on board named Victor Manuel Santiago?

"A. I remember the name Santiago, yes.

"Q. When did you first come in contact with this man Santiago?

"A. That was the day after leaving Boca Grande, I think—not think, I know it was the day after leaving Boca Grande.

"Q. And what did you have to do with Santiago then?

"A. He made a report that he was sick.

"Q. Did you go to see him?

"A. No, the captain went to see him.

[fol. 191] "Q. And were you with the captain?

"A. No, not at the time.

"Q. When did you first see him, the same day?

"A. The captain told me to take up some castor oil to him.

"Q. And did you obey that order of the captain?

"A. I obeyed the order; yes, sir.

"Q. Did you see Santiago in his bunk at the time?

"A. He was in his bunk at the time; yes, sir.

"Q. Did you notice anything about Santiago's condition when you saw him at that time?

"A. No; he reported being sick, and the old man told me to take him up some castor oil. He afterwards sent the third mate up to take his temperature.

"Q. Were you there when that was taken?

"A. Yes, sir.

"Q. And did it show high temperature?

"A. Showed fever temperature, yes.

"Q. In your position as steward on this ship did you have anything to do with supplies such as blankets?

"A. Yes, sir.

"Q. And was there any call for blankets on the part of Santiago or anyone acting for him?

"A. I gave him an extra blanket myself; took it to him.

"Q. And was that extra blanket in addition to what he already had?

"A. In addition to the one he already had, yes.

"Q. What was the weather at that time, leaving Boca Grande?

"A. It was warm.

"Q. Do you know whether it was over or under seventy degrees?

"A. Well, it might have been between sixty and seventy.

"Q. Did you have occasion to go in the forecastle every day after that?

"A. Yes, sir, because I fed him.

[fol. 192] "Q. And what food did you prepare for him?

"A. Soups.

"Q. And that was a special diet for him, was it?

"A. It was.

"Q. And did he take this food after you prepared it for him?

"A. Well, most of the time I sent it up with the messboy.

"Q. When you went up with it yourself did he always take it?

"A. I had to force him to take it.

"Q. What kind of care was he taking of himself in respect to keeping in bed and keeping covered up?

"A. Why, he didn't keep himself covered; and I warned him about it two or three times going up there. Whenever I had occasion to go up there I warned him about it.

"Q. Did you notice him smoking when you went up there?

"A. I went up there and he was lying in bed smoking cigarettes.

"Q. What did you observe at this forecastle with respect to the condition of dampness or water on the floor?

"A. I wouldn't try to tell you anything about the floor because I didn't notice it. If there was water in the forecastle I didn't see it.

"Q. From your knowledge of the ship did you ever know of any leak in that forecastle deck?

"A. No, not in the forecastle deck. It comes in through the portholes when they are open and we have rough weather.

"Q. All the time you were on the ship did you ever hear of any water coming into this forecastle except through the porthole?

"A. No, I never heard of it.

"Q. Did you observe the bunk in which Santiago was lying so that you could testify as to whether the bed clothes were wet or dry?

"A. Yes, I know that.

[fol. 193] "Q. What were the condition of those bed clothes?

"A. All dry."

Mr. Crawford: That is all.

Mr. Rosenberg:

"Q. That is, they were dry at the time you saw them?

"A. At the time.

"Q. But you were not regularly seeing them, were you?

"A. No.

"Q. Did you go into the quarters where Santiago was in company with the mates or the captain?

"A. I went there once, I think, with the third mate at the time he was taking his temperature.

"Q. That is the only time you ever went in there with any of the officers?

"A. With the officer, yes.

"Q. Or any of them?

"A. Or any of them, yes. I'll tell you why I remember that, because I had the thermometer myself.

"Q. Did you give him any physic after that at all?

"A. Yes, I was giving him oil in the morning and a dose of salts in the afternoon; a dose of oil in the morning and a dose of Epsom salts in the afternoon."

"Q. Did the captain have any difficulty about going over on the ship?

"A. No; I'll tell you; he had got one leg off in an accident.

"Q. But he has a wooden leg?

"A. He has a wooden leg, yes.

"Q. And he is pretty spry with that wooden leg?

"A. Pretty spry, yes.

"Q. You mean it was your duty to know about the clothes being wet or not; is that so?

"A. It was."

[fol. 194] Mr. Crawford (reading deposition):

"CLYDE ALEXANDER THOMAS, a witness of lawful age, called on behalf of the defendant, after being first duly sworn, testified, as follows:

"Direct examination:

"Q. Are you the cabin man on the steamship 'Delisle'?

"A. Yes, sir.

"Q. And what were your duties; what did you do as cabin man?

"A. My duty as cabin man was to take care of the captain and passengers, clean the chief mate's room, wireless operator's room, captain's room and staterooms and the saloon.

"Q. Do you remember this seaman, Victor Manuel Santiago?

"A. Yes, sir.

"Q. Was that the evening that you left?

"A. That was around supper time. After supper I goes forward every night to play cards with the sailors; and I saw him in his bed, and I asked him: 'What is the matter?' And he started patting his stomach.

"Q. And what did you or any of the sailors do then?

"A. I didn't do nothing. One of the sailors he was talking in Spanish with the other fellow, speaking now and then in Spanish. I didn't understand that. I don't know what he was saying.

"Q. Well, did he have any bed clothes over him at that time?

"A. Yes, he had bed clothes over him, right across his thighs.

"Q. What did they consist of, the bed clothes?

"A. Blanket and spread.

"Q. Now, did anybody take care of him or look after him in the forecastle?

"A. Yes, his friends. He had plenty of friends, sailors and firemen, of the same nationality.

[fol. 195] "Q. Did he keep the bed clothes over him, do you know?

"A. Not at all times, sir. He would take the bed clothes off and say it was too warm. I said to him: 'You don't do that; that is not good for you; you catch cold,' but he don't understand what I am telling him. He was laying in his bed.

"Q. Did he smoke any, while he was in this bunk, do you know?

"A. That Tuesday night he smoked a little, and on Wednesday he smoked a whole lot. He was an awful strong smoker. He smoked pretty near a carton of cigarettes from Boca Grande to Carteret. He smoked a whole lot.

"Q. Did you say anything to him about his smoking?

"A. Yes, sir; I told him it was not good for him. I says: 'You don't smoke; not good for you.' He stopped for a day and after he felt a little better he went on smoking again; and his friends told him in Spanish not to smoke; that it was not good for him; but he still continued smoking.

"Q. How did his condition seem to be as you came on up towards New York?

"A. About four days out, his condition seemed to be getting low, to me. Then I really said that he was sick, but I did not know what his sickness consisted of. He was more sick.

"Q. And then you say, after about four days you thought he was more sick?

"A. Yes, sir.

"Q. And what made you think he was more sick?

"A. I thought he was more sick; he was laying in his bunk; he didn't want any breakfast, dinner or supper, maybe some soup; he ate a little of it and would leave the balance of it; and nighttime he didn't want any supper; he got plenty of water and he drink that; he didn't want any supper.

[fol. 196] "Q. Did they give him any orange juice, do you know?

"A. Yes, sir. And I got orange juice myself and gave it to him.

"Q. Do you know whether he asked for any more blankets?

"A. No, sir, he didn't. He didn't because I would get the stores out of the storeroom and I would go up to him, but he didn't ask for any because it was not required; it was warm and he had plenty and it was not required.

"Q. Did you have any steam on in the sailor's quarters coming up from Boca Grande?

"A. No, sir, it was not necessary.

"Q. Why wasn't it necessary?

"A. We was in a warm climate, and steam was not necessary in a warm climate. We put chutes up to get wind inside of the forecastle to make the forecastle all right.

"Q. Could you get steam on in the sailors' quarters?

"A. If you wanted steam all you had to do was to go and see the chief engineer and he would put steam on if you wanted it.

"Q. How often would the sailors in the forecastle get clean bedding and bed clothes?

"A. Every week on Saturdays, and sometimes Sundays.

"Q. And what bedding would they get on that trip?

"A. They would get colored sheets, colored spread and a blanket, a single blanket and a pillow slip. That was always carried up.

"Q. Do you remember what particular food Santiago got on the voyage up?

"A. No, sir; I know on Sunday he had eggs. That Sunday he had eggs, two soft boiled eggs. The captain gave it to him. The mess boy took it up but I don't know if he ate it. He never ate much; dinner time and supper time he wouldn't eat no meat, you know; supper time he would take a cup of tea or something; he never ate much but soup.

[fol. 197] "Q. Did he get soup every day, do you know?

"A. He got soup every day; yes, sir.

"Q. Was he (referring to Miguel) the one that you say told him to keep the bed clothes over him?

"A. Yes, sir, he is the same one. He is an A. B., you know. They were buddies. They came over the same time, and he always looked out to see if he was all right. He would change his clothes and fix everything up for him. He would go and get tea and coffee and everything that he needed, with the assistance of the mess boy.

"Q. Was Santiago able to go to the toilet himself on the voyage up, do you know?

"A. Yes, sir; he was able to go himself."

Mr. Rosenberg:

"Q. Did you see any indication of Santiago being sick in any way on the voyage down?

"A. No, sir.

"Q. When did you first learn that Santiago was sick?

"A. The night that we left Boca Grande one of the sailors by the name of Somersill—one of the sailors said he was sick. He says—after we left Boca Grande he came to me, he says, 'Clyde, one of those sailors are sick forward'.

"Q. Did he ask for anything in particular so far as you could find out that night?

"A. No, sir." (That is the next page)—"A. No, sir.

"Q. Did you know what was the matter with him?

"A. No, sir; I just noticed that when I put my hand on his jaws I felt it warm and I said—I says: 'He must have a fever'.

"Q. How did his condition seem to be as you come on up towards New York?

"A. About four days out his condition seemed to be getting low to me. Then I really said that he was sick, but [fol. 198] I did not know what his sickness consisted of. He was more sick.

"Q. Did you think he was sick before that?

"A. Well, Tuesday night when I went up and saw him patting his stomach I thought he had just an aching stomach; I thought maybe he ate a little too much.

"Q. Were you there when he was taken away from the ship at Carteret?

"A. I was there but I didn't see him. I saw when the doctor came and the mate said he was troubled with double pneumonia.

"Q. He died the next day (referring to the day after Monday). Now, you knew that he was pretty sick when you felt his cheek, and you say that he was pretty warm; isn't that so?

"A. Yes, sir, that was the same day we left Boca Grande.

"Q. That was on a Tuesday?

"A. Yes, sir.

"Q. That you felt his jaw and his face?

"A. It was warm.

"Q. Very warm?

"A. Yes, sir; and I said, he must have a fever.

"Q. Who would put the blankets or coverings in the bunks of the seamen?

"A. They would put them in themselves.

"Q. You had nothing to do with that?

"A. No, I just gave it to them and they put them in themselves; I just gave it to them.

"Q. And how far would your ship be from Jupiter as you passed it?

"A. Oh, we would be about ten or fifteen miles out because the place is nothing but reefs and rocks.

"Q. This was the middle of the fall, the middle of October, a little after the middle of October. As you approached Cape Hatteras would it get colder or warmer?

[fol. 199] "A. It would keep about the same temperature for two days after we left Boca Grande. Two days out from Boca Grande it gets cool.

"Q. Now, the first time that you saw the mate in the forecastle was on that day (referring to Monday, the 23rd); isn't that so?

"A. Yes, the chief mate, I saw him up there.

"Q. Didn't he seem surprised at the condition of Santiago?

"A. He didn't look so to me. If he felt it he didn't look like it to me.

"Q. What time of the day was Santiago taken off the ship?

"A. Just about supper time.

"Q. Did you ever see the master of the ship in the forecastle during the time that Santiago was sick?

"A. I did not see him. I don't know if he went when I was not looking."

Mr. Crawford (reading deposition):

"Cecil Deelande, a witness of lawful age, called on behalf of the defendant, after being first duly sworn, testified as follows:

"Direct examination:

"Q. Were you the officers' messroom man on the 'Delisle'?

"A. I was the officers' mess man on the 'Delisle'.

"Q. The mess man, and you were and have been, have you, since September 18th, 1928?

"A. Yes, sir.

"Q. And tell me what you do as officers' mess man?

"A. I take care of the chief engineer and all the mates and three assistant engineers.

"Q. And do you remember this seaman Santiago?

"A. Yes, sir.

[fol. 200] "Q. And what did that bedding consist of (referring to Santiago's bed)?

"A. Pillow case, mattress cover, a spread and a blanket. That is for the sailors.

"Q. And do you know whether the sailors' quarters were clean, or were they dirty when you went in there?

"A. They were clean because a sailor on board named Somersill, he used to clean it up every morning.

"Q. How about the sailors' toilet forward?

"A. That was clean, too.

"Q. Now, did you have any heat on in the sailors' rooms or the other rooms coming up from Boca Grande?

"A. Not until we got up north.

"Q. Why didn't you have it?

"A. Because we didn't need it; it was quite warm. If they did need it and if they asked the chief engineer for it he would have given it.

"Q. Do you know what food he got coming up from Boca Grande?

"A. He got the same food that the officers and captain ate; came right out of the galley right to his bunk.

"Q. Do you know whether he got any soup on the way up?

"A. Soup every afternoon.

"Q. Do you know whether he got any orange juice?

"A. Orange juice in the morning or any time he asked for it.

"Q. Do you know whether or not he was told to keep his blanket over him coming up from Boca Grande?

"A. Yes, the sailors used to speak to him to keep the blanket over him to keep him from catching cold, but he

felt kind of warm and he was right by the door and he didn't want any blanket on; he wanted to feel cool.

"Q. Did he keep his blanket on?

"A. No, he didn't; every time you put it on he would take it off.

[fol. 201] "Q. Did he ask for any more bedding on the voyage up?

"A. No, he didn't.

"Q. Was there any really cold weather on the voyage up from Boca Grande?

"A. No, there was not; just mild and warm.

"Q. Do you know whether they had anything put out of the portholes so as to bring the air into the rooms?

"A. Yes, they had wind chutes, round things that slip up to catch the wind in which direction it is going.

"Q. To make the fresh air come in?

"A. Yes, sir. Then there is two doors, and he was right by the door, too.

"Q. He was in that bunk from the start, from the time the ship left Boca Grande to the time she arrived in Carteret?

"A. Yes, sir.

"Q. Now, you remember that he laid on the hatch sweating at the time the ship was in Boca Grande?

"A. Yes, sir.

"Q. Now, after the ship got up around Cape Hatteras was it pretty cool then?

"A. It was not so cool, no."

Mr. Rosenberg:

"Q. How old are you?

"A. I am twenty years old.

"Q. Now, your duties as the officers' mess man had nothing to do with taking care of the seamen in the forecastle; is that right?

"A. No.

"Q. So that all of this testimony that you are offering is testimony based on the fact that once in a while you would go into the forecastle with the seamen?

"A. Yes, sir.

"Q. But your duties kept you in the saloon and in the pantry of the officers, is that so?

"A. Yes, sir, every day.

[fol. 202] "Q. And you slept in an altogether different part of the ship?

"A. Yes, amidships.

"Q. You know that Santiago died the next day after he was taken off the ship; isn't that so?

"A. Yes, sir.

"Q. And you could tell that he was pretty sick?

"A. I could tell that he was pretty sick because a couple of days before we got in I noticed his face sunk in.

"Q. How did you tell it was sunk in?

"A. His eyes, you know; his cheeks going in a little.

"Q. His cheeks were hollow?

"A. His cheeks were hollow; yes, sir.

"Q. What about his eyes?

"A. His eyes were deep.

"Q. Sort of hollow, too?

"A. Hollow, yes.

"Q. What else did you notice about his condition at that time?

"A. Well, he was very weak. When going to the bathroom he needed somebody to help him.

"Q. Who was taking care of Santiago all this time?

"A. The sailors was taking care of him; and it was the mess boy's job but he was kind of lazy and no good.

"Q. The mess boy did not do very well about it, did he; is that right; the mess boy was not doing what he should have done; isn't that so?

"A. Yes, sir; that is right.

"Q. Did you see the steward in the sailors' forecastle taking care of Santiago?

"A. No, I did not see him.

"Q. What did you hear the steward say about Santiago during the time you were on the ship on that trip?

"A. I did not hear him say anything about him; I didn't hear him say anything.

[fol. 203] "Q. Did you see him give any attention at all to Santiago?

"A. No, I did not.

"Q. Do you know whether or not it is the job of the steward to take care of the sick on board the ship?

"A. Yes, sir, I do.

"Q. It is his job, is it?

"A. It is his job.

"Q. What was the steward doing most of the time during this trip going north when Santiago was sick?

"A. The steward was in his department looking after what the fellows should have to eat and different things around, cleaning and——

"Q. (Interrupting.) Did he have a lot of leisure time?

"A. Yes, you do have a little.

"Q. He has a lot of leisure time when the ship is at sea; isn't that so?

"A. Yes, sir.

"Q. Did you see the steward take any medicine at all to Santiago?

"A. No.

"Q. Where was the medicine chest on board that ship?

"A. In the captain's mess room; the saloon, they call it.

"Q. Did you ever see anybody take anything out of it for Santiago during that trip?

"A. No, I did not.

"Q. Do you know whether or not the captain did anything for Santiago during that trip?

"A. No, I did not.

"Q. Did anybody come from ashore on the ship to take care of Santiago during the day (referring to the day when the ship came in)?

"A. No, not that I know of.

"Q. You could tell that Santiago was very sick; isn't that so?

"A. Yes, I could tell he was very sick, because he could hardly walk, and when a man can hardly walk who is active and being in good health you know he must be sick."

[fol. 204] Mr. Crawford (reading deposition):

"Sotero Escabi, a witness of lawful age, called on behalf of the defendant, after being first duly sworn testified as follows:

"Direct examination:

"Q. What do you do on board the steamship 'Delisle'?

"A. Water tender.

"Q. And what are your duties as water tender?

"A. Take care of the water of the boilers.

"Q. Where did you live on board the 'Delisle'; in what quarters?

"A. Forward.

"Q. In the firemen's quarters?

"A. In the firemen's quarters.

"Q. Do you remember this voyage in October last coming up from Boca Grande to Carteret when Santiago the seaman was sick?

"A. Yes, I remember it.

"Q. Can you tell us whether it was cold or warm coming up on that voyage?

"A. It was a normal temperature, like summer, something like that; it was not bad weather.

"Q. Did you need any steam on in your quarters coming up on that voyage?

"A. No, sir.

"Q. Did you need any steam the day or the night before you got to New York?

"A. No.

"Q. If you had had steam turned on in your quarters the day before you got to New York of the night that you were at anchor there, how would it have been in your quarters?

"A. It would have been too hot in there. We would have to leave the forecastle.

"Q. Do you know whether Santiago had medicine given to him on the voyage coming up?

"A. Yes, sir.

[fol. 205] "Q. Do you remember seeing his soup being carried to him in the sailors' quarters?

"A. Yes, sir, I seen it."

Mr. Rosenberg:

"Q. After Santiago went into Santiago's room and his bunk, did Santiago leave his room and his bunk?

"A. No.

"Q. He stayed inside all the time?

"A. Until they got to Carteret.

"Q. He was too sick to leave his room; isn't that so?

"A. He said he couldn't leave by himself. They had to carry him out in Carteret.

"Q. You do not remember seeing Santiago on the deck the day before you got to New York?

"A. No.

"Q. What hours were your watches?

"A. From eight to twelve.

"Q. He was too sick the day before the ship got to Carteret; isn't that so?

"A. Yes."

Mr. Crawford: Defendant rests.

Mr. Rosenberg: Plaintiff rests.

MOTIONS TO DISMISS AND FOR DIRECTED VERDICT

Mr. Crawford: I renew my motions made at the close of the plaintiff's case to dismiss the complaint, and I also move for the direction of a verdict in favor of the defendant on the ground that no cause of action is made out in this case.

Mr. Crawford: In connection with my motion to dismiss and my further motion for the direction of a verdict, I call upon the plaintiff to state at this time whether he is proceeding under the so-called Jones Act of 1920, or whether his remedy is based on the old maritime common law rules, [fol. 206] and I ask the Court to compel the plaintiff to make this election before this case is summed up to the jury and the charge given.

Mr. Rosenberg: In answer to that I beg leave to state that I refuse to elect, because there cannot be any proper election in this case. The defendant in this case is a resident and a citizen of New Jersey.

I am going to ask the privilege of putting in the New Jersey statutes.

The Court: I will deny the motion, so far as the motion is based upon the point that the plaintiff as administrator has no capacity or right to maintain a cause of action of this sort, with an exception.

Mr. Rosenberg: It is conceded that Maryland is the port of registry of the ship.

Mr. Crawford: I think it is improper after both sides have rested to bring it under another statute. That is an improper amendment in the pleadings.

The Court: I will pass upon plaintiff's motion to amend his complaint so as to plead the New Jersey act, when I have seen a text of that act.

Mr. Rosenberg: I waive any defense required to be pleaded under the act.

Mr. Crawford: You are not in a position to waive any of my pleadings.

The Court: You waive any additional advantages you may have under the text of that statute from the remedies given in the Jones Act.

[fol. 207] MOTION TO AMEND COMPLAINT

Mr. Rosenberg: I move to amend my complaint so as to plead the statutes of New Jersey, which statutes apply to a death by wrongful act and for the right to recover damages in cases where the death of the person is caused by the wrongful act, neglect or default.

Mr. Crawford: I object to this amendment at this time, on the ground that the plaintiff and defendant have both rested. I have no opportunity to plead and prove the defense of negligence of fellow-servants, which would be available to me under the New Jersey statutes. I have no opportunity to go into the defense of contributory negligence as fully as I might.

The rule is different under the New Jersey statute than it would be under the Maritime Law, where comparative negligence applies, and for the further reason that the rule of damages is different under the two acts, on the ground if this were an action under the New Jersey statute, this Court is without jurisdiction, and on the pleadings as they now stand, there being no specific allegation of diversity of citizenship.

On the further ground that the action was not properly brought in this District, if it were an action based on anything else than a Federal statute, or the Maritime Law.

Mr. Rosenberg: I think that Mr. Crawford would not be harmed by the amendment, inasmuch as the plaintiff is not seeking to recover damages on account of any negligence [fol. 208] of any seaman on the ship, unless such a seaman happened to be acting under the orders of the officers.

In other words, inasmuch as my claim is based on the negligence of the officers of the ship and those acting through them——

The Court: I understand that the plaintiff would prefer to have the Court deny the motion rather than to grant it, if the granting of the motion would be on condition of declaring a mistrial and ordering a new trial of the case.

Under those circumstances, and in consideration of defendant's claim of surprise, I will deny the motion to amend so as to plead the New Jersey statute, with an exception to Mr. Rosenberg.

Mr. Rosenberg: Exception.

Mr. Crawford: Have you denied my motions as to the election? There was no ruling on that.

The Court: I will deny the motion made by the defendant to compel the plaintiff to elect whether he will proceed under the Jones Act or otherwise. The motion to dismiss and the motion to direct a verdict by the defendant, those motions are denied.

Mr. Crawford: Exception.

(Mr. Crawford summed up the case to the jury on behalf of the defendant.)

(Mr. Rosenberg summed up the case to the jury on behalf of the plaintiff.)

[fol. 209] CHARGE TO JURY

The COURT (PATTERSON, J.):

GENTLEMEN OF THE JURY: This is a suit by Rafael Cortes as administrator of one Victor Manuel Santiago against the Baltimore Insular Line, Inc. It appears that Santiago was a seaman on board the steamship "Delisle". He is the decedent in this case. The "Delisle" was operated by the defendant.

The cause of action is maintained for the benefit of the parents of the deceased seaman, the mother of whom you saw on the witness stand.

The plaintiff claims in this case that the death of Santiago was due to the negligence of the defendant, and that is the primary question for solution by the jury.

It is undisputed here that the steamship was proceeding from Boca Grande in Florida up to Carteret, New Jersey, with a load. And it is undisputed that that day on leaving Boca Grande, or the day following, the illness of Santiago was noticed. He was discharged from the boat when it arrived at Carteret, in an ambulance, and died the following day in the hospital.

It is undisputed that his illness was later diagnosed as pneumonia, and it is a fair inference that he had the illness when he first fell ill aboard the boat.

The plaintiff claims that the treatment given Santiago was inadequate under all the conditions, and also that under the circumstances the officers should have put him off at a nearby port, instead of making the trip up north, and put him off at the end of the voyage. Plaintiff claims negligence in either or both of these respects.

The defendant denies negligence and also asserts that the death was not due to the negligence, even if there was negligence.

[fol. 210] You gentlemen are the triers of the facts in this case, the exclusive triers of the facts. My province is merely to charge you the rules of law that are applicable to the case, and if I mention the facts in the course of this charge, I do not mean by that that the facts I mention are the real facts or that they are the undisputed facts. I mean merely to call your attention to the contentions of the parties, as ably presented by counsel, and also to illustrate how the rules of law may become concrete in relation to certain facts.

I charge you, as a matter of law, that a sailor is entitled to maintenance and cure. That is a legal expression. Of course, cure should not be taken literally, because there are certain things that cannot be cured. To cure means to give reasonable attention in case of illness or in case of injury aboard a boat.

The defendant here, however, is not an insurer. It is not in the position of an insurance company which issues policies to people guaranteeing them against accidents or other forms of injury or illness. It is not to be charged with liability, in the absence of negligence, but it is for you gentlemen to say whether or not it was negligent.

In this case the plaintiff must establish to your satisfaction by a preponderance of the evidence two things.

First, that the defendant was negligent, and, second, that Santiago's death resulted from such negligence, and not from other causes.

Negligence, gentlemen, means simply a failure to use reasonable care under the circumstances of the case, a failure to observe and adhere to the standard conduct that a reasonable man, under the circumstances, would have observed.

[fol. 211] You, of course, know that you cannot expect the same diagnosis and the same medical skill from an officer of a boat as you can from an experienced and qualified physician, and so you do not hold them to the same standard.

Causation is a legal expression, and signifies that the plaintiff must show the damage he suffered was due to that negligence and as a result of that negligence or failure to use due care he was injured, or, as in this case, that death actually resulted from that same negligence.

As to negligence here, the question for you to determine is whether the officers of this boat, as reasonable men, should have realized that the plaintiff was a sick man, or a dangerously sick man, and that they should have realized that condition, and it is for you to say whether or not in the exercise of reasonable judgment they should have put into port and taken the man off, or should have transferred him to some other vessel, or should have taken other measures on board the boat than they did take.

If, on the other hand, you believe that as reasonable men these officers would not, in due care and in the exercise of their best judgment, have realized that this Santiago was a very sick man, then you may find that they were not negligent in their care and in their treatment of him.

As to the causation feature, which I said was the second element, it is a question for you to determine, especially in view of the medical testimony which you have listened to, whether the man, in your judgment, would have died anyway. If he would have died anyway, irrespective of the care which he would have received, or irrespective of whether he had been put off the boat, as long as the officers [fol. 212] should have realized that he was a dangerously sick man, then, of course, the death was not due to any act of negligence of the defendant, if there was negligence, and there should be no recovery.

But if, on the contrary, you come to the conclusion that the defendant was negligent and that death resulted from that, then there is causation in the case, and it is for you to determine just as the first question, which is the question of negligence.

If you find that there is no negligence, or that there was no causation, that is, the death of Santiago was not the result of any negligence of the defendant at all, then your verdict will be for the defendant.

But if you find on these issues for the plaintiff, I have further instructions to give you as to damages. From the fact that I am now charging you about the damages, what the law calls the measure of damages, you are not to infer that I believe you should find damages for the plaintiff in this case. I am giving you your instructions as a body, as a unit, and everything I say from now on is on the assumption that you have found for the plaintiff, If you find for the defendant, you may disregard what I say from now on.

If the defendant was negligent and the plaintiff is entitled to your verdict, then the plaintiff is entitled to such a sum as will represent the loss resulting to the parents by reason of the deprivation of reasonable expectation of pecuniary benefits from the son's earnings, that is, of the deceased, which benefits were lost through the death of this man.

You will recall that the mother testified that she had been [fol. 213] in receipt of monthly sums from the deceased, ranging from, I believe, ten dollars a month up to thirty dollars a month, and the amount for six months he had been away from home was somewhere between one hundred and one hundred and fifty dollars. Perhaps it was one hundred and fifty dollars for the six months, which is at the rate of three hundred dollars a year. Now, of course, he might have increased this amount later on, or he might have diminished it, or cut it out altogether, It is for you gentlemen to say whether he would have continued them and if so in what amounts.

I might add a few general observations which might assist you in weighing the testimony in this case. The law in cases of this sort, gentlemen, is peculiarly one of common sense in judging the testimony. You are to use the same common sense that you use in your everyday affairs, the same common sense that you use in your ordinary walks of life.

You are to judge the evidence by its quality and not by its quantity, not by the number of witnesses which the one side may have as against the other side, but by the impression you receive from the demeanor of the witnesses, and from all the other factors in the case. You might take into account, of course, that a witness may testify a certain way because of his interest in the case or because of his friendship. You must weigh the testimony with all of these considerations in your mind.

I think that is the entire charge. There have been no requests handed up.

REQUESTS TO CHARGE

Mr. Crawford: I would like to make one request.

[fol. 214] I ask your Honor to charge the jury that if they find that the plaintiff's death was contributed to, in whole or in part, by his own negligence, that that diminishes the amount of any recovery by the amount to which the plaintiff's own negligence contributed to his death, in that proportion.

That is the maritime law, under the Merchant Marine Act, or under the old law.

The Court: If you find that the death of Santiago was contributed to by his own carelessness, by his own negligence, then you are to diminish any amount which you otherwise award the plaintiff in this case by such a fraction as you believe his contributory negligence contributed to the total negligence.

In other words, if you find that the defendant was negligent and that the deceased's death resulted therefrom, and if you find, purely by way of illustration, the damages were one hundred dollars, then on considering the contributory negligence of Santiago you might consider he was to blame also and that he was as much at fault as the defendant. In that case you take one-half, assuming them to be at fault in equal degree, which is fifty dollars, and you subtract that from the one hundred dollars, leaving fifty dollars.

Of course, these figures, and these fractions, as I have stated to you, are purely illustrative, and that is the way to determine contributory negligence in this sort of case.

Mr. Crawford: I ask your Honor to charge the jury if they believe any of the witnesses in this case have deliberately sworn falsely——

The Court: Yes. If you find that any witness in the case has willfully testified falsely as to a material fact in the [fol. 215] case, you may then, if you see fit, disregard the entire testimony of such witness.

You may retire.

VERDICT

(At 4:23 o'clock P. M. the jury retired to consider their verdict and returned to the court room at 4:40 o'clock P. M. and announced that they found a verdict for the plaintiff in the sum of five thousand dollars.)

MOTION TO SET ASIDE VERDICT

Mr. Crawford: I move to set aside the verdict on all the grounds mentioned in Section 549 of the Civil Practice Act and also on the jurisdictional grounds which I raised in my motion to dismiss and for the direction of a verdict.

The Court: Motions denied.

Mr. Crawford: Exception.

[fol. 216] PLAINTIFF'S EXHIBIT 2

(Extract from Hospital Records)

CM/EAB

Treasury Department, United States Public Health Service, Office of Medical Officer in Charge

Abstract from Clinical Record

(Address:) U. S. Marine Hospital Station, Stapleton, S. I., New York

Carl Michel, Surgeon, U. S. P. H. S., Executive Officer.

Victor M. Santiago. Occupation: Seaman.
Last vessel: SS. "De Lisle".

Patient admitted to hospital by ambulance in a delirious and cyanotic condition. Unable to give any history at all.

Diagnosis.—Lobar Pneumonia, with consolidation on both sides, particularly in the lower lobes. Temperature of

patient 104 Fahrenheit. Crepitant rales on the right middle, the right lower and left lower lobes of the lung, on auscultation. He also had dullness over these areas, on percussion. Breath rapid, lips dry and crusty, and the respirations were grunting.

Treatment.—Given oxygen.

Prognosis.—Very poor, with expected mortality within 24 hours.

[fol. 217] DEFENDANT'S EXHIBIT B

Temperatures as shown in Deck Log.

Q. Will you give me the temperatures each day coming up from Boca Grande?

A. Each day?

Q. Yes; and the time of day that the temperature was taken?

A. All right, sir.

(Witness refers to logbook.)

The Witness: The day we left there, at four P. M.—no, at eight P. M.—it was not four P. M. the temperature was 83, and at midnight it was 80; and

On the 17th at four A. M. it was		80
	8 A. M. "	83
	Noon	88
	4 P. M.	88
	8 P. M.	82
	Midnight	80
On the 18th at 4 A. M.		80
	8 A. M.	83
	Noon	88
	4 P. M.	84
	8 P. M.	83
	Midnight	79
On the 19th at 4 A. M.		79
	8 A. M.	82
	Noon	84
	4 P. M.	81
	8 P. M.	72
	Midnight	74

On the 20th at	4 A. M.	74
	8 A. M.	76
	Noon	76
	4 P. M.	65
	8 P. M.	62
	Midnight	60
On the 21st at	4 A. M.	60
	8 A. M.	62
	Noon	78
	4 P. M.	62

[fol. 218] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AND ORDER SETTLING BILL OF EXCEPTIONS

It is hereby stipulated and agreed that the foregoing contains all the testimony and exceptions made at the trial of this case, and that the same may be settled and ordered on file as the bill of exceptions herein.

Dated New York, January 28th, 1931.

Jesse L. Rosenberg, Attorney for Plaintiff. Hunt, Hill & Betts, Attorneys for Defendant.

Upon the foregoing stipulation, it is ordered, that the foregoing may be settled and ordered on file as the bill of exceptions herein.

Dated January 30, 1931.

Robert P. Patterson, U. S. D. J.

[fol. 219] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 43—310

RAFAEL CORTES, as Administrator of the Goods, Chattels, and Credits of Manuel Victor Santiago, Deceased, Plaintiff,

against

BALTIMORE INSULAR LINE, INC., Defendant

JUDGMENT

This cause having been on the Calendar of this Court and having been reached in its regular order for trial, and the

plaintiff having appeared by Jesse L. Rosenberg, his attorney, and the defendant having appeared by Hunt, Hill & Betts, Esqs., its attorneys, and H. Victor Crawford, of counsel, and the cause having been tried before the Court and a jury, and the jury having returned into Court a verdict in favor of the plaintiff and against the defendant for Five thousand ($5,000.00) Dollars, it is on motion of Jesse L. Rosenberg, Esq., attorney for the plaintiff,

Ordered that the plaintiff Rafael Cortes, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased, recover from and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with interest from the 23rd day of October, 1928, the date of the death of Victor Manuel Santiago, deceased, for whose death said action was brought, amounting to $515, and costs and disbursements in the sum of $507.30, making in all the sum of $6,022.30, and [fol. 220] that he have execution therefor.

Judgment signed July 11, 1930.

Alex. Gilchrist, Jr., Clerk.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION TO AMEND JUDGMENT—Oct 8, 1930

The defendant herein, having moved this Court at a stated term for motions for an order nunc pro tunc correcting and amending the judgment in this cause heretofore entered and filed in the office of the Clerk of this Court, the 11th day of July, 1930, by striking therefrom the words, "recover from [fol. 221] and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with interest from the 23rd day of October, 1928, the date of the death of Victor Manuel Santiago, deceased, for whose death said action was brought, amounting to $515.00 and costs and disbursements in the sum of $507.30, making in all the sum of $6,022.30," and substituting therefor the following:—"recover from and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with costs and disbursements

in the sum of Five hundred and seven Dollars and Thirty cents ($507.30), making in all the sum of Five thousand five hundred and seven Dollars and Thirty cents ($5,507.30), with interest thereon from the date hereof," and said motion having duly come on to be heard,

Now, on reading and filing the notice of motion herein and the affidavit of William R. Meagher, Esq., verified October 2, 1930, annexed thereto, and having heard H. Victor Crawford, Esq., in support of said motion, and Jesse L. Rosenberg, Esq., in opposition thereto, and due deliberation having been had, on motion of Jesse I. Rosenberg, Esq., attorney for plaintiff, it is

Ordered that the said motion be and the same hereby is denied.

Robert P. Patterson, U. S. D. J.

Notice of settlement of the foregoing order is hereby waived.

Hunt, Hill & Betts, Attorneys for Defendant.

[fol. 222] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO AMEND JUDGMENT

SIR: Please take notice that upon the annexed affidavit of William R. Meagher, sworn to the 2nd day of October, 1930, and upon all of the proceedings heretofore had herein, the defendant will move this Court at a stated term for motions to be held in the Federal Courthouse in the Post Office Building in the Borough of Manhattan, City of New York on Tuesday, the 7th day of October, 1930, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard for an order nunc pro tunc correcting and amending the judgment in this cause heretofore entered and filed in the office of the Clerk of this Court the 11th day of July, 1930, by striking therefrom the words "recover from and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with interest from the 23rd day of October, 1928, the date of the death of Victor Manuel San-

tiago, deceased, for whose death said action was brought, [fol. 223] amounting to $515.00 and costs and disbursements in the sum of $507.30, making in all the sum of $6,022.30", and substituting therefor the following: "recover from and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with costs and disbursements in the sum of Five hundred and seven dollars and thirty Cents ($507.30), making in all the sum of Five thousand five hundred and seven dollars and thirty Cents ($5,507.30), with interest thereon from the date hereof," together with such other and further relief as to the Court may appear just and proper in the premises.

Yours, etc., Hunt, Hill & Betts, Attorneys for Defendant. Office & P. O. address: 120 Broadway, Borough of Manhattan, New York City.

To Jesse L. Rosenberg, Esq., Attorney for Plaintiff. Office & P. O. address: 15 Park Row, Borough of Manhattan, New York City.

[fol. 224] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WILLIAM R. MEAGHER, READ IN SUPPORT OF MOTION TO AMEND JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

William R. Meagher, being duly sworn, deposes and says that he is associated with the firm of Hunt, Hill & Betts, attorneys for the defendant in the above-entitled action; that said action has been under deponent's personal supervision since the date of its inception to the present time, and he is personally familiar with all the proceedings heretofore had therein.

This suit was brought at law under the Federal Employers' Liability Act, to recover damages for death alleged to have been caused by the negligence of the defendant. Upon the trial, the jury returned a verdict in favor of the plaintiff in the sum of Five thousand ($5,000.00) Dollars. There-

after, and on July 11, 1930, there was entered and filed [fol. 225] in the Office of the Clerk of this Court a judgment, a copy of which is annexed hereto, providing, in part, as follows:

"Ordered that the plaintiff, Rafael Cortes, as Administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased, recover from and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with interest from the 23rd day of October, 1928, the date of the death of Victor Manuel Santiago, deceased, for whose death said action was brought, amounting to $515.00, and costs and disbursements in the sum of $507.30, making in all the sum of $6,022.30, and that he have execution therefor."

Deponent submits that the provision in this judgment awarding interest from the date of the death of the deceased is contrary to law and should be corrected. The suit having been brought under the Federal Employers' Liability Act, interest on the damages awarded should run not from the date of death but from the date of judgment. This rule has been repeatedly asserted by the Courts.

Thus, in the case of Lynott v. Great Lakes Transit Corporation, 202 App. Div. 613, suit was brought in the State Court to recover for the death of a seaman injured on the Great Lakes. After trial, a judgment was entered for the amount of the verdict, together with interest from the date of decedent's death to the date of the verdict. Thereafter defendant moved to correct the judgment nunc pro tunc by striking out the amount of interest thus awarded. The [fol. 226] motion was denied. Upon appeal, the denial of this motion was held improper, the Court saying, at page 621, "As this action rests entirely upon the Federal Statute, the ruling under the Federal Employers' Liability Act is applicable and interest is not allowable."

The Court cited as authority for this proposition the case of Norton v. Erie Railroad Co. No. 2, 163 App. Div. 468, wherein it was said:

"The plaintiff seeks to have included in the judgment interest upon the verdict from the time of the death of the plaintiff intestate as is provided in 1904 of the Code of Civil Procedure. I think that section is not applicable to

this case for the reason that the action is brought under the Federal Employers' Liability Act and the verdict rests solely upon the claim arising under that Act. * * * No provision is made in the Federal Act for adding such interest to the verdict, and I think the provisions of our Statute may not be invoked for that purpose."

In the Federal Court it has been held that even in admiralty where the allowance of interest upon damages sustained is in the discretion of the Court in cases of tort for personal injuries, interest may be awarded only from the date of the judgment. The leading case respecting this doctrine is that of Burroughs et al. v. Lownsdale, 133 Fed. 250, in which the Court below awarded the libellant interest upon the amount of damages awarded him from the time of filing the libel to the time of rendering the judgment. Upon appeal this was held to be error, and the proper rule was then stated by the Circuit Court of Appeals:

"It is the settled law in this country that whether interest shall be allowed by the Court of first instance or by the [fol. 227] Appellate Court in admiralty on the amount of damage in a collision case is within the discretion of the Court." (Citing cases.) "But this rule does not apply to actions for damages for personal injuries. The distinction between the two classes of cases is pointed out by the Supreme Court of Tennessee in the case of Louisville and Nashville R. Company v. Wallace, 15 S. W. 921, 14 L. R. A. 548. As there said, a personal interest never creates a debt nor becomes one until it is judicially ascertained and determined; nor until that time can it draw interest."

This case was cited with approval in The Argo, 210 Fed. 872. This was an action of tort in admiralty for personal injury. Interest was allowed upon the damages awarded from the date of the accident to the date of the final decree. The award was held to be excessive and it was said, page 875:

"While damages for loss or injury to property or for the non-payment of money may, in the discretion of the Court, be compensated in admiralty by the allowance of interest * * * in cases of tort for personal injuries, interest is not allowable until the extent of the damages is judicially

ascertained. (Burroughs v. Lownsdale, 133 Fed. 250 Com. 66 C. C. A. 650.)"

Accordingly, the decree was modified by striking therefrom the allowance of interest from the date of the injury to the date of the decree.

These authorities clearly establish that the award of interest in the judgment herein is erroneously excessive.

Wherefore deponent prays for an order correcting and amending the judgment heretofore entered and filed in the [fol. 228] office of the Clerk of this Court the 11th day of July, 1930, by striking therefrom the words, "recover from and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with interest from the 23rd day of October, 1928, the date of the death of Victor Manuel Santiago, deceased, for whose death said action was brought, amounting to $515.00 and costs and disbursements in the sum of $507.30, making in all the sum of $6,022.30", and substituting therefor the following: "Recover from and against the defendant, Baltimore Insular Line, Inc., the sum of Five thousand ($5,000.00) Dollars, damages, with costs and disbursements in the sum of Five hundred and seven dollars and thirty Cents ($507.30), making in all the sum of Five thousand five hundred and seven dollars and thirty Cents ($5,507.30), with interest thereon from the date hereof."

William R. Meagher.

Sworn to before me this 2nd day of October, 1930. James E. Bennett, Jr., Notary Public, New York County. N. Y. Co. Cl'k's No. 809, Reg. No. 1B58A. Kings Co. Cl'k's No. 177, Reg. No. 1630. Bronx Co. Cl'k's No. 130, Reg. No. 81310. Queens Co. Cl'k's No. 1470, Reg. No. 9089. Commission expires March 30, 1931. (Seal.)

[fol. 229] Citation, in usual form, omitted in printing.

[fol. 230] IN UNITED STATES DISTRICT COURT

RAFAEL CORTES, as Administrator of the Goods, Chattels, and Credits of Victor Manuel Santiago, Deceased, Plaintiff-Respondent,

against

BALTIMORE INSULAR LINE, INC., Defendant-Appellant

ORDER ALLOWING APPEAL—Sept. 10, 1930

On reading the petition of Baltimore Insular Line, Inc., made on its behalf by Hunt, Hill & Betts, its attorneys, dated September 10, 1930, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal herein be allowed as prayed for; and it is further

Ordered that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit.

Dated New York, January 30, 1931.

Francis G. Caffey, United States District Judge.

[fol. 231] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ORDER ALLOWING APPEAL

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Baltimore Insular Line, Inc., by its attorneys, Hunt, Hill & Betts, respectfully shows:

That on July 11, 1930, this Court entered a judgment in favor of the plaintiff and against the defendant, in the sum of Five thousand Dollars ($5,000.00), with interest from the 23rd day of October, 1928, and costs and disbursements in the sum of Five hundred seven and 30/100 Dollars ($507.30), making in all the sum of Six thousand twenty-two and 30/100 Dollars ($6,022.30), in which judgment and the proceedings had prior thereto certain errors were com-

[fol. 232] mitted to the prejudice of the defendant, all of

which will appear more in detail in the assignment of errors which is filed with this petition.

Wherefore defendant does hereby appeal from said judgment of this Court to the United States Circuit Court of Appeals, for the Second Circuit, and prays that this appeal may be allowed and that a transcript of the record of proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that such other and further proceedings may be had as may be proper in the premises.

Hunt, Hill & Betts, Attorneys for Defendant-Appellant. Office & P. O. address: 120 Broadway, Borough of Manhattan, City of New York.

[fol. 233] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

The defendant in the above entitled action in connection with its petition for a writ of error, assigns the following errors which it avers occurred upon the trial of this cause, to wit:

1. That the Trial Court erred in denying defendant's motion to dismiss the complaint at the close of plaintiff's case.

2. That the Trial Court erred in denying defendant's motion to dismiss the complaint and for the direction of a verdict in favor of the defendant made at the close of the entire case.

3. That the Trial Court erred in denying defendant's motion to compel the plaintiff to elect between his remedies under the old maritime rules and Section 33 of the Merchant Marine Act of 1920 known as the Jones Act.

[fol. 234] 4. That the Trial Court erred in including in the judgment entered herein an item of interest on the verdict from the date of death amounting to $515.00.

5. That the Trial Court erred in denying defendant's motion to amend the judgment nunc pro tunc by striking

therefrom the item of interest on the verdict from the date of death in the amount of $515.00.

Hunt, Hill & Betts, Attorneys for Defendant-Appellant. Office & P. O. address: 120 Broadway, Borough of Manhattan, New York City.

[fol. 235] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York, January 28th, 1931.

Jesse L. Rosenberg, Attorney for the Plaintiff. Hunt, Hill & Betts, Attorneys for the Defendant.

[fol. 236] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 237] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1930

No. 357

Argued April 13, 1931. Decided July 28, 1931

Rafael Cortes, as Administrator of the Goods, Chattels, and Credits of Victor Manuel Santiago, Deceased, Plaintiff-Appellee,

v.

Baltimore Insular Line, Inc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Action by Rafael Cortes, as administrator, to recover for the death of his intestate, a seaman employed by de-

fendant. Upon verdict of a jury, judgment was entered for the plaintiff, and defendant has appealed. Reversed.

Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., and H. Victor Crawford, both of New York City, of counsel), for appellant.

Jesse L. Rosenberg, of New York City, for appellee.

OPINION

SWAN, Circuit Judge:

This is an action at law brought by the administrator of Victor Manuel Santiago, deceased, on the theory that his death was caused by the defendant's negligence. The defendant is a New Jersey corporation with an office in the city of New York, and it operated a vessel upon which Santiago shipped as a seaman for a voyage from the port of New York to Boca Grande, Fla., and return, in October, 1928. During the return voyage Santiago became sick. After the vessel reached port he was removed to the Staten Island Marine Hospital, where his condition was diagnosed as lobar pneumonia with consolidation on both sides. He died the following morning.

The complaint charges that during the several days of Santiago's dangerous illness the officers of the ship failed to give him medical care and attention, allowed him to remain in the sailors' quarters in the forecastle, which were cold, unsanitary, and equipped with insufficient bedding, provided him with insufficient and improper food, failed to obtain aid from passing vessels, sought no medical assistance when anchor was dropped at Sandy Hook, and after the steamer's arrival at its destination delayed for several hours to remove him to a hospital, and that his death resulted from the negligence of the defendant as above set forth. At the conclusion of the evidence, the jury found for the plaintiff; and, since the record is not entirely barren of evidence to support some of the charges, we must take it that the defendant failed to give Santiago the care he should have been given during his illness. The evidence would not, in our opinion, sustain a verdict based on the theory that any affirmative acts of the defendant's agents caused his death, but it might justify a finding that the defendant omitted performance of its maritime duty to pro-

vide "cure" to the sick seaman, in that it failed to land him at some port on the voyage north, or to furnish more expert medical treatment on board, or to get him promptly to a hospital on arrival of the vessel at the port of New York. We shall assume for purposes of our discussion a causal relationship between such omission by the defendant and the sailor's death.

By the maritime law a seaman who falls sick or is wounded in the service of the ship has always been entitled to "wages, maintenance and cure"—that is, cure, for the word "cure" means care, not a positive cure, which may, indeed, be impossible. The Mars, 149 F. 729, 731 (C. C. A. 3); The Bouker No. 2, 241 F. 831, 835 (C. C. A. 2). If a [fol. 238] breach of the obligation to care for the sick or wounded seaman aggravated his condition and resulted, for example, in the amputation of a limb or in permanent disability, he could recover not only expenses for medical treatment, but compensatory damages as well. The Iroquois, 113 F. 964, 969 (D. C. N. D. Cal.) affirmed, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955; The Troop, 128 F. 856 (C. C. A. 9); The City of Alexandria, 17 F. 390, 395 (D. C. S. D. N. Y.); Scarff v. Metcalf et al., 107 N. Y. 211, 216, 13 N. E. 796, 1 Am. St. Rep. 807; Benedict, Admiralty (5th Ed.) § 83. But if death resulted, no action lay, for neither the general maritime law nor the common law gave an action for the death of a person. Western Fuel Co. v. Garcia, 257 U. S. 233, 240, 42 S. Ct. 89, 66 L. Ed. 210; Lindgren v. United States, 281 U. S. 38, 47, 50 S. Ct. 207, 74 L. Ed. 686. Hence the plaintiff must show some statutory authorization for the present suit. He relies upon section 33 of the Merchant Marine Act (commonly referred to as the Jones Act), 41 Stat. 1007 (46 U. S. C. A. § 688).

This statute provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law," in which action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply, and that, "in case of the death of any seaman as a result of any such personal injury," his personal representative may maintain an action for damages, and "in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be

applicable." The statutes referred to are the Federal Employers' Liability Act (35 Stat. 65), and its amendments (45 U. S. C. A. §§ 51-59). Panama R. R. Co. v. Johnson, 264 U. S. 375, 391, 44 S. Ct. 391, 68 L. Ed. 748; Lindgren v. United States, supra. That act declares that a common carrier shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce, or, in case of the death of such employee, to his personal representative (for the benefit of designated surviving relatives), "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." Section 1 (45 U. S. C. A. § 51).

The chief question raised by this appeal is whether section 33 of the Jones Act can properly be construed as creating a cause of action for the death of a seaman resulting from an illness which he contracted without fault attributable to the defendant, where the ship's officers neglect to provide proper medical treatment and thereby (it is assumed) fail to check a curable illness or accelerate death from a noncurable one.

It is argued by the appellant that a seaman who falls ill without fault on the part of the ship does not suffer a "personal injury" within the meaning of the statute. But, if a failure to treat the illness aggravates the disease, we should find no difficulty in considering the aggravated condition as a "personal injury," assuming that the statute should be interpreted to have been meant to cover such a case. Analogies may be found in decisions under compensation statutes where acceleration of a pre-existing disease resulting in death is held to come within the term "injury." In re Brightman, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; Pace v. N. D. Workmen's Compensation Bureau, 51 N. D. 815, 201 N. W. 348.

It is another question whether the Jones Act was meant to cover such a case as the plaintiff's. On behalf of the appellant it is argued that the duty to provide cure is a contractual obligation (see Pacific Co. v. Peterson, 278 U. S. 130, 138, 49 S. Ct. 75, 78, 73 L. Ed. 220), and that nonperformance of a contractual obligation cannot be deemed "negligence" within the meaning of the Federal Employers' Liability Act, which by incorporation into the Jones Act is made applicable to seamen. We think the argument

is valid. The Jones Act was intended to confer upon seamen the rights and remedies enjoyed by railway employees by virtue of the Federal Employers' Liability Act, one purpose of which, and perhaps the chief purpose, was to abrogate the fellow servant doctrine and make applicable the principle of respondeat superior in respect to injury or death resulting from tortious acts of the carrier's servants. See Jamison v. Encarnacion, 281 U. S. 635, 639, 50 S. Ct. 440, 74 L. Ed. 1082. A railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service, and no liability would exist for injury or death resulting from a failure to furnish such treatment. Even if such a duty were assumed by contract, we do not [fol. 239] think a failure to act in performance of the contract would give rise to any liability under the Federal Employers' Liability Act, which presupposes an actionable tort, not liability under a contract. See Galveston, etc., Ry. Co. v. Hennegan, 33 Tex. Civ. App. 314, 76 S. W. 452; Willey v. Alaska Packers' Ass'n, 9 F. (2d) 937 (D. C. N. D. Cal.). If a tort is essential in the case of injury or death to a railway employee, the statute can have no different meaning by reason of being made applicable to injuries to seamen. Moreover, if "negligence" were interpreted so broadly as to include every failure to furnish maintenance and cure, it would have the effect of affording under the Jones Act remedies for every breach of the maritime contract, except perhaps merely failure to pay wages. We do not believe this was intended. In Pacific Co. v. Peterson, supra, it was said that "the statute was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages—to which it made no reference," and that no election was required "between the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, cure and wages under the old rules—the latter being a cumulative right and in no sense inconsistent with, or an alternative of, the right to recover compensatory damages." We regard this as an intimation that the Supreme Court thinks the old rights and remedies in respect to maintenance and cure outside the scope of the statute.

The only case discovered by the industry of counsel or by the court's own efforts, which has dealt directly with the problem here involved, is the opinion of Judge Kerri-

gan in the Willey Case, supra. There a libel was filed by the executor of a deceased sailor against the shipowner on a charge that a cold contracted by the sailor in the ship's service had developed into tuberculosis and resulted in his death because the defendant failed to give timely medical attention to the sailor's cold. A decree was entered for the defendant, and on a motion for rehearing, Judge Kerrigan discussed the application of the Jones Act and held that the statute contemplated a death resulting from a negligent tort, and was inapplicable where the only affirmative duty shown to have been violated was the contractual duty to provide cure. On appeal the decree was affirmed, but on other grounds. 18 F. (2d) 8 (C. C. A. 9).

A similar interpretation of the Jones Act seems to have been made in Persson v. Gulf Refining Co., 228 App. Div. 366, 239 N. Y. S. 796; Id., 228 App. Div. 844, 240 N. Y. S. 892, where damages were claimed for injury, not death. This was a suit by a seaman for compensatory damages based on two causes of action—the first, under the Jones Act for negligence in causing the plaintiff's injuries; the second, under the old maritime law for failure to provide him with cure for his injuries. The jury found for the defendant on the first cause of action, and for the plaintiff on the second. On appeal, the defendant assigned as error that the plaintiff had not been compelled to elect between his two causes of action. The court held that no election was necessary.

For reasons already stated, we are of opinion that the Jones Act does not provide a remedy for death resulting from an illness which occurred without fault on the part of the ship but was aggravated by a failure to perform the ship's maritime duty to provide cure. The paucity of authority on this question is itself somewhat persuasive that the statute should not be construed as the plaintiff contends. See The City of Alexandria (D. C.) 17 F. 390, 395.

The plaintiff contends that, even if no action for the death is given by the Jones Act, he should be allowed to maintain his suit under the New Jersey statute relating to death by wrongful act (2 Comp. St. 1910, p. 1907, § 7 et seq., as amended), which he requested leave to set up by amendment of his complaint. But we do not find proof in the

record to sustain jurisdiction on the ground of diverse citizenship. There is an allegation in the complaint, denied by the answer, that the plaintiff resides in Brooklyn; but we find neither allegation nor proof of his citizenship. The defendant corporation is admittedly a citizen of New Jersey. Moreover, it may well be doubted whether the death statute of New Jersey can be relied on in view of Lindgren v. United States, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686. This point, however, is not before us at the present time, and we do not decide it.

In accordance with the views above expressed, the defendant's motion to dismiss the complaint or to direct a verdict in its favor should have been granted.

Accordingly, the judgment is reversed, and the cause remanded.

[fol. 240] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

RAFAEL CORTES, Plaintiff-Appellee,

v.

BALTIMORE INSULAR LINE, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed Aug. 4, 1931

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed, with costs. Further ordered that execution be issued for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 241] [File endorsement omitted.]

[fol. 242] In United States Circuit Court of Appeals

[Title omitted]

Order Staying Mandate

On the affidavit of Jesse L. Rosenberg, sworn to the 5th day of August, 1931, and on the transcript of record herein, let the defendant-appellant show cause at a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at Room 434 of the old Post Office Building in the Borough of Manhattan, City of New York, on the 5th day of October, 1931, at 10:30 o'clock in the forenoon, or as soon thereafter as Counsel can be heard, why an order should not be made and entered providing for the amendment of the transcript of record so as to include therein plaintiff's Exhibit No. I, and why the plaintiff-appellee should not have such other, further and different relief as may be equitable, and it is further

Ordered, that pending the argument of this motion, the mandate of this Court herein and any judgment, decree or order herein, be stayed, and it is further

Ordered, that the time in which plaintiff-appellee may file his petition for rehearing in this case is extended fifteen days from the time of the filing of an order on this motion in the Clerk's office of this Court.

And sufficient reason appearing therefor, service of this order on the defendant-appellant's attorneys on or before [fol. 243] the 15th day of August, 1931, shall be deemed sufficient.

Dated New York, August 5, 1931.

Manton, Circuit Judge.

[fol. 244] In United States Circuit Court of Appeals

[Title omitted]

Affidavit of Jesse L. Rosenberg

State of New York,
County of New York, ss:

Jesse L. Rosenberg, being duly sworn, deposes and says:

I am the attorney for the plaintiff-appellee herein.

On July 28, 1931, an opinion rendered by Honorable Circuit Judge Swan was filed in the Clerk's office of this Court

under which the judgment of the District Court is reversed and the cause remanded.

The action is a death action and is based on the Jones Act. Plaintiff-Appellee contended, however, that if the Jones Act did not apply, the New Jersey Statute relating to death by wrongful act should apply. This question was taken up by Judge Swan, who, in his opinion, stated, that the plaintiff-appellee had not proved jurisdiction on the ground of diverse citizenship. Judge Swan further states:

"There is an allegation in the complaint, denied by the answer, that the plaintiff resides in Brooklyn; but we find neither allegation nor proof of his citizenship. The defendant corporation is admittedly a citizen of New Jersey. [fol. 245] Moreover, it may well be doubted whether the death statute of New Jersey can be relied on in view of Lindgren v. United States, 281 U. S. 38. This point, however, is not before us at the present time and we do not decide it."

This application for an order to show cause is made for the purpose of amending the transcript of record so that the transcript of record, when amended, will show that the District Court had jurisdiction on the ground of diversity of citizenship.

On —, folio 45 of the transcript of record, appears the following:

"I will offer in evidence the letters of administration granted to Rafael Cortes, the plaintiff in this case.

Mr. Crawford: No objection.

(Paper marked Plaintiff's Exhibit No. I.)"

Plaintiff-Appellee did not deem it necessary to have plaintiff's Exhibit No. I printed in the transcript of record and dispensed with it because the question of diverse citizenship was never seriously raised by the defendant-appellant and because plaintiff-appellee did not wish to cause unnecessary expense to his adversary. Attached hereto is a copy of plaintiff's Exhibit No. I.

Plaintiff-Appellee has a legal right to make this application under United States Code, Title 28, Section 399, which reads as follows:

"(Judicial Code, Section 274c.) Amendments to Show Diverse Citizenship.—Where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may [fol. 246] amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal. (Mar. 3, 1915, c. 90, 38 Stat. 956.)"

See also Norton v. Larney, 266 U. S. 511, page 516.
Plaintiff's Exhibit No. I recites:

"Rafael Cortes, of No. 91 Union Street, Brooklyn, New York City, a creditor of Victor Manuel Santiago, late of the County of Kings, deceased."

The testimony elicited from decedent's mother, Carmen Santiago, on page 62, folio 185 of the transcript of record (cross examination) is as follows:

"Q. Do you intend to return to Porto Rico after this trial is finished?
A. Yes, sir.
Q. You left your home there, and you intend to go back to it, is that right?
A. Yes, sir.
Q. Now, during the past two or three years have you been receiving any money from your son, Cortes, who is in court here to-day?
A. Yes, sir."

Thus, the record shows that decedent's mother's home is in Porto Rico and that Rafael Cortes, the administrator, is her son.

Deponent relies on the following authorities to show that with the transcript of record thus amended, enough

will have been proved to sustain jurisdiction on the ground of diverse citizenship.

Sun Printing & Publishing Association v. Edwards, 194 U. S. 377;

Reichman v. Harris (C. C. A.), 252 Fed. 371.

[fol. 247] In Sun Printing & Publishing Association v. Edwards, supra, on page 383, referring to the plaintiff, White, Chief Justice, said:

"He must have been a citizen of Delaware or a subject of a foreign State."

In the case at bar, the defendant is admitted to be a citizent of the State of New Jersey. There is proof that the plaintiff is a resident of Brooklyn (Plaintiff's Exhibit No. I), and since he is a son of a Porto Rican mother, the presumption is that he is a citizen (United States Code, Title 8, Section 5). In any event, from the transcript of record it appears he was not a citizen of New Jersey, but that he was a citizen of New York, Porto Rico or a subject of a foreign state, and on that proof the Court would have jurisdiction.

Since plaintiff-appellee wishes to file a petition for rehearing, but only after a decision of this motion to amend the transcript of record, deponent respectfully requests that the time in which plaintiff-appellee may file his petition for rehearing may be extended to fifteen days from the time of the filing of the order on this motion in the Clerk's office of this Court and that this Court meanwhile stay the issuance of its mandate herein and the enforcement of any decree, judgment or order in connection with this case.

No previous application for the relief herein requested has been made.

Jesse L. Rosenberg.

Sworn to before me this 5th day of August, 1931. Anna Joss, Notary Public, New York County. N. Y. Co. Cl'k's No. 139, Reg. No. 3-J-170. Term expires March 30, 1933. (Seal.)

[fol. 248] PLAINTIFF'S EXHIBIT No. I

File No. 8664—1928

Limited

The People of the State of New York by the Grace of God Free and Independent, to Rafael Cortes, of No. 91 Union Street, Brooklyn, New York City, a creditor of Victor Manuel Santiago, late of the county of Kings, deceased, send Greeting:

Whereas the said deceased died intestate, and was at the time of his death a resident of the County of Kings, by means whereof the ordering and granting Administration of all and singular the personal property, goods, chattels and credits whereof the said intestate died possessed, and also the auditing, allowing and final discharging the account thereof, does appertain unto us; and we, being desirous that the personal property, goods, chattels and credits of the said intestate may be well and faithfully administered, applied and disposed of, do grant unto you the said Rafael Cortes, full power, by these presents, to administer and faithfully dispose of all and singular the said personal property, goods, chattels and credits; to ask, demand, recover and receive the debts which unto the said intestate, whilst living, and at the time of his death, did belong; and to pay the debts which the said intestate did owe, as far as such personal property, goods, chattels and credits will thereto extend and the law require; hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the personal property, goods, chattels and credits of the said intestate within a reasonable time, and return a duplicate thereof to our Surrogate of the County of Kings within three months from [fol. 249] the date of these presents; and if further personal property or assets of any kind not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge, to make or cause to be made, in like manner, a true and perfect inventory thereof, and return the same within one month after the discovery thereof; and also to render a just and true account of administration when thereunto required; and we do by these presents, depute, constitute and appoint you, the said Rafael Cortes,

Administrator of all and singular the personal property, goods, chattels and credits which were of the said Victor Manuel Santiago, deceased.

And you are hereby restrained from compromising any right of action granted to you as Administrator by special provision of law, and from the enforcement of any judgment recovered therein, until the further order of the Surrogate on additional further satisfactory security.

In testimony whereof we have caused the seal of the Surrogate's Court of Kings County to be hereunto affixed.

Witness Hon. George Albert Wingate, Surrogate of our said County of Kings, the 16th day of November, 1928.

(Signed) John H. McCooey, Clerk of the Surrogate's Court. (Seal of Surrogate.)

[fol. 249½] Service of a copy of the within Affidavit and Order to Show Cause is hereby admitted.

Dated, N. Y., August 6, 1931.

Hunt, Hill & Betts, Attorneys for Defendant-Appellant.

United States Circuit Court of Appeals, Second Circuit. Filed Oct. 13, 1931. William Parkin, Clerk.

[fol. 250] In United States Circuit Court of Appeals

[Title omitted]

Affidavit of H. Victor Crawford

State of New York,
County of New York, ss:

H. Victor Crawford, being duly sworn, deposes and says:

That he is an attorney and a member of the firm of Messrs. Hunt, Hill & Betts, attorneys for the defendant-appellant herein;

That dependent acted as trial counsel for the defendant and also prepared the transcript of record on appeal and is familiar with all proceedings herein;

That plaintiff's Exhibit No. 1, referred to at folio 45 of the transcript of record, was not printed as a part thereof

for the reason that no issue had been raised on the trial of the fact of the due appointment of plaintiff as Administrator;

That plaintiff's Exhibit No. 1 is the usual letters of administration of the Surrogate's Court, Kings County, New York, signed by the Clerk of the Court;

That this Exhibit was proof of one fact only, namely the appointment of plaintiff as Administrator.

At the time that this Exhibit was offered in evidence and received without objection on deponent's part, there was [fol. 251] no allegation in the case of the citizenship or residence of the plaintiff. The Exhibit does not purport to contain a statement by any one that Cortes was a citizen or resident of Kings County, New York, but merely refers to the plaintiff as "Rafael Cortes, of No. 91 Union Street, Brooklyn, N. Y." There is no reason to suppose that the Clerk of the Surrogate's Court, Kings County, had any knowledge whatsoever of the actual residence of the plaintiff, and, even if this description be considered a statement, it must be excluded as hearsay if offered in an attempt to prove residence or citizenship.

Even should this Court permit the transcript of record to be amended by the insertion of plaintiff's Exhibit No. 1, there would still be in the record no proof on which to base any jurisdiction in the District Court for the Southern District of New York. If it were assumed, as plaintiff's counsel suggests, that Cortes is either a Porto Rican or a citizen of Kings County, New York, the Southern District of New York was not the proper district in which to lay the venue. The defendant is admittedly a resident and citizen of the State of New Jersey and in any action brought in a district other than the Eastern District of New York or the District of New Jersey, an objection to the venue would have to be sustained. There was no question of any waiver on the part of the defendant to object to the venue for, just as soon as plaintiff attempted at the close of the trial to amend his complaint so as to plead the death act of New Jersey and so turn the case into one based upon diversity of citizenship, deponent objected to the amendment on the following grounds among others (folio 621) "on the further ground that the action was not properly brought in this district if it [fols. 252 & 252½] were an action based on anything else than a Federal statute or the Maritime Law". This court

has held, in the case of Lehigh Valley Coal Company vs. Washko, 231 F. 42, that there is no waiver of the right to object to the venue as long as a defendant objects as soon as he has knowledge of the true state of the facts.

The cases relied upon by the Plaintiff-Appellee do not support the proposition that citizenship has been established in this case. In the case of the Sun Printing & Publishing Association vs. Edwards, 194 U. S. 377, the defendant was a citizen of the district in which suit was brought, and hence it made little difference whether plaintiff was a citizen of some other state or an alien. In the case of Reichman vs. Harris, the defendants were likewise residents of the district in which suit was brought and, upon a finding by the Jury that the plaintiff was a resident of a different state, the court concluded that the Jury meant to find the plaintiff was both a citizen and a resident of said state.

As it is apparent that granting present motion would not give Plaintiff-Appellee the relief sought, and, as the parties agreed upon the record by written stipulation, folios 703-704, dependent prays that motion herein be denied.

H. Victor Crawford.

Sworn to before me this 16th day of September, 1931. William R. Meagher, Notary Public, Bronx County. Bronx Co. Cl'k No. 29, Reg. No. 3253. N. Y. Co. Cl'ks No. 370, Reg. No. 2 M 306. Commission expires March 30, 1932. (Seal of William R. Meagher, Notary Public, Bronx County N. Y.)

[fol. 253] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the Post Office building, in the city of New York, on the 24th day of October, one thousand nine hundred and thirty-one.

[Title omitted]

ORDER DENYING MOTION TO AMEND TRANSCRIPT OF RECORD—Filed Oct. 26, 1931

A motion having been made herein by counsel for the appellee to amend the transcript of record herein, and for other relief,

Upon consideration thereof it is

Ordered that said motion be and hereby is denied.

Wm Parkin, Clerk.

[fol. 254] [File endorsement omitted.]

[fols. 255-261] Petition for rehearing, covering seven pages, filed November 10, 1931, omitted from this print. It was denied and nothing more by order of December 10, 1931.

[fol. 262] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed Dec. 10, 1931

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 263] [File endorsement omitted.]

[fol. 264] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 265] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which ac-

companied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,566. U. S. Circuit Court of Appeals, Second Circuit. Term No. 12. Rafael Cortes, as administrator of the goods, chattels, and credits of Victor Manuel Santiago, deceased, petitioner, vs. Baltimore Insular Line, Inc. Petition for a writ of certiorari and exhibit thereto. Filed March 2, 1932. File No. 36,566.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted] 12

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

against

BALTIMORE INSULAR LINE, INC.,

Respondent.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

BASIL O'CONNOR,
120 Broadway,
New York City.

JESSE L. ROSENBERG,
15 Park Row,
New York City,
Counsel for Petitioner.

BASIL O'CONNOR,
JESSE L. ROSENBERG,
WILLIAM F. SNYDER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

No. _____

RAFAEL CORTES, as administrator of the goods, chattels and credits of VICTOR MANUEL SANTIAGO, deceased, *Petitioner,* *against* BALTIMORE INSULAR LINE, INC., *Respondent.*	**Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Rafael Cortes, respectfully shows to this Honorable Court as follows:

Nature of Proceeding and Decision Below.

This is an action at law brought in the United States District Court for the Southern District of New York by your Petitioner, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased, to recover damages on the ground that the intestate's death was caused by Respondent's negligence. The intestate was a seaman employed by Respondent.

Upon a verdict of a jury, judgment was entered for Petitioner in the amount of $6,022.30, including $5,000.

damages, $515. interest from the date of death, and costs (R., p. 219). On appeal to the Circuit Court of Appeals for the Second Circuit the judgment of the District Court was reversed with an opinion by Judge Swan (R., pp. 237-242), and an order of reversal was entered on August 4, 1931, which directed that an appropriate mandate issue to the District Court (R., p. 243). A petition by your Petitioner to the Circuit Court of Appeals for a rehearing (R., pp. 252-258) was denied by an order entered and filed on December 10, 1931 (R., p. 259).

Reasons for Granting the Petition.

Your Petitioner urges that the decision of the Circuit Court of Appeals should be reviewed by this Court for the following reasons:

1. By virtue of the decision in the instant case and the recent decision in *Harris* v. *Pennsylvania Railroad Co.* (C. C. A., Va. 1931), 50 F. (2d) 866, there arises a serious conflict of opinion and authority between the Circuit Courts of Appeals for the Second and Fourth Circuits in respect to the interpretation and application of Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. §668).

2. The Circuit Court of Appeals erred in holding that the failure to provide "cure" to a seaman cannot be deemed "negligence" within the meaning of the Employers' Liability Act, which is made applicable to seamen by incorporation into Section 33 of the Merchant Marine Act of 1920.

3. The Circuit Court of Appeals erred in its interpretation of this Court's decision in *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, which it relied on in reaching its decision.

WHEREFORE, your Petitioner prays, in view of the foregoing reasons, that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, requiring said Court to certify and send to this Honorable Court a transcript of the records and proceedings in this case, to the end that the decree of said Court may be reviewed, and that your Petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

BASIL O'CONNOR,
JESSE L. ROSENBERG,
Counsel for Petitioner.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BASIL O'CONNOR, being duly sworn, deposes and says that he is one of the counsel for the above named Petitioner; that he has read said petition and that said petition is true to the best of his knowledge, information and belief.

BASIL O'CONNOR.

Sworn to before me this
29th day of February, 1932.
ALICE W. JUDGE,
Notary Public
Notary Public, New York County
New York County Clerk's No. 77
New York County Register's No. 3-J-48
Commission Expires Mar. 30, 1933.
[NOTARIAL SEAL]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,
Petitioner,

against

BALTIMORE INSULAR LINE, INC.,
Respondent.

Brief in Support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Application is made under Section 240 (a) of the Judicial Code for certiorari to review a final order in law rendered by the Circuit Court of Appeals for the Second Circuit on August 4th, 1931, and shown at page 243 of the Record. (Petitioner's petition for a rehearing was denied by the Circuit Court of Appeals by an order entered December 10, 1931 and shown at page 259 of the Record.) The decision of the Circuit Court of Appeals is reported in 52 F. (2d) 22.

Statement of Facts.

In October, 1928, Petitioner's intestate, Victor Manuel Santiago, was a seaman on board the Steamship *Delisle* (R., pp. 16, 144), owned and operated by Respondent

(R., pp. 3, 8). On October 16, 1928 the *Delisle* left Boca Grande, Florida, and proceeded north along the coast, arriving at Carteret, New Jersey on October 22, 1928 (R., pp. 16, 160).

On leaving Boca Grande, Santiago became ill (R., p. 18). He was dangerously sick during the entire voyage north (R., pp. 19, 26, 55, 205). After the vessel reached Carteret, he was removed to the Staten Island Marine Hospital where his condition was diagnosed as lobar pneumonia, with consolidation on both sides (R., p. 67). He died at 8:45 A. M. on October 23, 1928 (R., p. 72).

Although Santiago was seriously sick on October 17, 1928, the chief mate forced him to work until about noontime that day (R., p. 19). The ship had a hospital room (R., p. 129), but Santiago was kept in the sailors' quarters in the forecastle, which were damp, cold, unsanitary and equipped with insufficient bedding (R., pp. 20-23, 43, 47, 50). No seaman was assigned to take care of him (R., p. 141) and the master personally did nothing for him (R., pp. 127-128). The chief mate admitted he did not give medicine to Santiago (R., p. 139). The only testimony in the case which indicates that any care was given to Santiago is that of the third mate who said he gave him quinine and physics (pills) twice a day (R., p. 152) and of the steward who said he gave Santiago a dose of oil in the morning and epsom salts in the afternoon (R., p. 193).

Although the ship went north along the coast a great part of the trip, Santiago was not put ashore. The steamer dropped anchor in the Raritan River on October 21st at 6:35 P. M. and remained there until the following morning at 6:00 (R., p. 138), but no medical assistance was sought or obtained. When the vessel arrived at Carteret at 8:20 A. M., no physician or anybody else was summoned to assist Santiago (R., p. 160). The

Marine Hospital did not receive the call for an ambulance until 3:00 P. M. on that day (R., p. 75). The patient was reached at 4:20 and admitted to the hospital at 5:45 P. M. (R., p. 75).

Petitioner brought an action at law in the District Court on the theory that his intestate's death was caused by Respondent's negligence. Upon a verdict of a jury, judgment was entered for Petitioner (R., p. 219). This judgment of the District Court was reversed on appeal to the Circuit Court of Appeals by order of August 4, 1931 (R., p. 243) and a rehearing was denied by order of December 10, 1931 (R., p. 259).

Merchant Marine Act, §33.

Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A., §688), referred to herein as the Jones Act, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

POINT I.

By virtue of the decision in the instant case and the recent decision in Harris v. Pennsylvania Railroad Co. (C. C. A., Va. 1931), 50 F. (2d) 866, there arises a serious conflict of opinion and authority between the Circuit Courts of Appeals for the Second and Fourth Circuits in respect to the interpretation and application of Section 33 of the Merchant Marine Act of 1920.

In the recent case of *Harris* v. *Pennsylvania Railroad Company* (1931), 50 F. (2d) 866, the Circuit Court of Appeals for the Fourth Circuit reversed a judgment for the defendant entered upon a directed verdict of the District Court for the Eastern District of Virginia in an action at law by Minnie C. Harris, administratrix of the estate of Ernest L. Harris, against the Pennsylvania Railroad Company, to recover damages for his death while in the defendant's employ as a deck hand on a car float of the defendant. The action was instituted under the provisions of Section 33 of the Merchant Marine Act of 1920.

While engaged in the performance of his duties, the intestate fell overboard and was drowned. The evidence disclosed that the members of the crew might have saved him had they used due diligence.

Two main questions were presented on the appeal: (1) Whether when the seaman fell overboard by reason of his own misfortune or carelessness and without negligence on the part of any other member of the crew, the defendant owed him a duty to rescue him from his peril; and (2) if this duty be found to exist, whether there was negligence on the part of the crew in failing to perform it.

The Court answered the first question in the affirmative, saying:

> "We have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect, falls into the sea; and that the owners are liable if, by failure to perform this duty, his life is lost."

After reviewing the exceptional nature of a seaman's contract and the peculiar relationship of the seaman to his ship, the court said that, "By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land." The court stated that the duty of the ship to use due diligence to save one of the crew, *both in the case of illness or injury and in the case of a seaman falling overboard*, "* * * is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right."

On the second question the court said:

> "We think also that the evidence was sufficient to justify the submission to the jury of the issue of negligence."

After reviewing the evidence in connection with the acts of the members of the crew to save the seaman, the court said:

> "These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had been used."

It is obvious from the above opinion and th opinion of the Circuit Court of Appeals for the Second Circuit in the instant case that there is a serious conflict between the two Circuits on an identical question of law. The result of the *Harris* case is to permit a recovery by an administrator under the Jones Act where the jury finds that the crew of a vessel negligently failed to perform its duty to give to a seaman maintenance and cure. In the instant case, although the jury had already found that the officers of the *Delisle* were negligent in their failure to furnish cure to Petitioner's intestate, which resulted in his death, the Circuit Court reversed the judgment below on the ground that the Jones Act was not meant to cover such a case.

These two decisions cannot be reconciled in any spect. In the *Harris* case the Circuit Court held, in effect, that, although the duty to provide maintenance and cure is implied in the contract of employment, the failure to perform the duty may constitute "negligence" within the meaning of the Employers' Liability Act, which, by incorporation into the Jones Act, is made applicable to seamen, because that Act must be construed in the light of the duties arising by virtue of the peculiar relation of a seaman to his ship. The Court recognized in its opinion that a seaman gets greater protection than one employed in service upon the land. In the instant case the Circuit Court held that the duty to provide cure is a contractual obligation and that non-performance of a contractual obligation cannot be deemed "negligence" within the meaning of the Employers' Liability Act. This holding, by the Circuit Court of Appeals for the Second Circuit, was supported by the reasoning that:

> "A railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service, and no liability would exist for injury or death resulting from a failure to furnish such treatment,"

thus wholly ignoring the tremendous difference between the relationship a railroad employee has with his master and the relationship a seaman has with a vessel.

Petitioner submits that to secure uniformity of decisions, this petition for a writ of certiorari should be granted.

POINT II.

The failure to provide cure to a seaman can be deemed "negligence" within the meaning of the Employers' Liability Act, and the Circuit Court of Appeals erred in its holding to the contrary.

The Circuit Court of Appeals has definitely held in its opinion that if a failure to treat a seaman's illness aggravates the disease he suffers, the aggravated condition is a "personal injury" within the meaning of the Jones Act. The Court further held, however, that the duty to provide cure is a contractual obligation, and that non-performance of a contractual obligation cannot be deemed "negligence" within the meaning of the Employers' Liability Act. Petitioner submits that the Court erred in this latter holding.

Because a duty to furnish medical attention to a sick or injured employee is not imposed upon a railway carrier, and therefore there can be no liability under the Employers' Liability Act, as applied to railroads, for failure to provide such medical attention, it does not follow that under the Jones Act, which has incorporated the Employers' Liability Act, there can be no recovery for willful failure to provide medical attention or for negligent conduct in furnishing "cure" to a seaman, when the law has imposed upon the vessel and owner such a duty.

Since the relations between a railroad carrier and an employee are so patently and fundamentally different from the relations between a vessel and seaman, it follows that the duties arising by virtue of those relations are not and cannot be identical. The two fields of law in connection with these two wholly dissimilar master-servant relations have developed along different lines.

As stated in the opinion of the Court, in *Harris* v. *Pennsylvania Railroad Co., supra,* (p. 868):

> "There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. * * * By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land."

It is obvious that the Federal Employers' Liability Act was specifically designed by Congress to apply to conditions as they obtain on railroads. The difficulty now appears to be to relate such a statute, not specifically designed to apply to any other conditions, to conditions obtaining on navigable waters. It is reasonable to assume, therefore, that when the Employers' Liability Act was incorporated into the Jones Act it was intended to apply to the peculiar situations arising and duties applying on navigable waters, and not to those situations arising or duties applying in railway cases. To make sense it must be construed and interpreted in the light of existing *maritime* law—not railroad law.

Petitioner submits that the Circuit Court of Appeals erred in assuming that the only duties whose breaches create liability under the Jones Act are those arising by virtue of the master-servant relation on railroads.

The Circuit Court of Appeals further stated that the Federal Employers' Liability Act presupposes an ac-

tionable tort, not liability under a contract. It is true that the duty to provide maintenance and cure may be *called* a contractual obligation, but that is merely academically calling the duty a name. The duty is imposed by operation of law and "grows out of that which was termed in the *Montezuma* (C. C. A.) 19 F. (2d) 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel", (*Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 49 S. Ct. 75). The duties imposed upon a railway carrier in connection with an employee also grow out of the contractual relation between them and they might just as validly be called contractual obligations. It is obvious that without the contract there would not be the duty. The protection the law seeks to give to an employee, especially to a seaman who requires it most, should not be denied and the statute providing a remedy unduly narrowed by technical distinctions in nomenclature.

Furthermore, assuming that the duty to provide maintenance and cure may be contractual, nevertheless, a willful failure to perform the duty, or negligent conduct in its performance may be a tort as well as a breach of contract. There is abundant authority for the proposition that a tort may grow out of, or be coincident with a contract.

In *Osgoodby* v. *Talmadge*, (1930), 45 Fed. (2d) 696, the Circuit Court of Appeals for the Second Circuit by Swan, J., said in part:

> "Of course, there are numerous classes of contracts, where the promisor's conduct may constitute both a breach of his promise and a tortious violation of some other legal duty closely related to the contractual duty; in such case the promissee may have his election between a remedy *ex contractu* and *ex delicto*. Negligent transportation of goods under a contract of carriage is, perhaps, the most obvious example."

In *Rich* v. *N. Y. C. & H. R. R. Co.*, (1882), 87 N. Y. 382, at page 390, the Court said:

> "And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with a contract (2 Bouvier (*supra*),), and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. (Cooley on Torts, 90.) In such cases the tort is dependent upon, while at the same time independent of the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. (1 Addison on Torts, 13.)"

In *Attleboro Mfg. Co.* v. *Frankfort Marine, etc. Ins. Co.*, (1917) 240 Fed. 573, the plaintiff sued the defendant insurance company in tort for the recovery of damages caused plaintiff by the negligent defense by the insurance company of the action instituted by one of plaintiff's employees for damages suffered as the result of an injury sustained in plaintiff's plant.

The relationship between the parties giving rise to the torts complained of was established by the contract of insurance, several provisions of which plaintiff pleaded. The defendant contended that the cause of action was in contract and not in tort. The circuit court overruled that contention, saying in part (page 579):

> "The plaintiff does not seek in any of the counts to recover damages for a breach of contract, and the contract is not set out for the purpose of showing that its obligations have been broken by the defendant. The allegations of this character were made for the purpose of showing the relationship existing between the parties, and the rights of the plaintiff in the subject-matter as to which the defendant was dealing and which it was bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law."

As in the above case, last cited, the relationship between the parties in the instant case was created by contract out of which grew duties imposed by law, which Respondent was "bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law." A failure to use due care in the performance of those duties or a willful failure to perform them clearly constitutes "negligence" or a tort.

See also:

The Western States, (1907), 151 Fed. 929, Aff'd 159 Fed. 354;

Schick v. *Fleishhauer,* (1898), 26 App. Div. 210, 49 N. Y. S. 962;

Franklin Fire Ins. Co. of Philadelphia v. *Weinberg, et al.* (1920), 110 Misc. 644; 181 N. Y. S. 15;

Kennedy v. *F. W. Woolworth Co.* (1923), 205 App. Div. 648; 200 N. Y. S. 121;

Cooley on Torts, (3rd Edition), Vol. I, pp. 2, 156.

POINT III.

The Circuit Court of Appeals erred in its interpretation of this Court's decision in Pacific S. S. Co. v. Peterson, 278 U. S. 130, which it relied on in reaching its decision.

The Circuit Court of Appeals stated in its opinion that *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, is "an intimation that the Supreme Court thinks the old rights and remedies in respect to maintenance and cure outside the

scope of the statute" (the Jones Act) (R., p. 241). Petitioner believes that the case holds no more than that the Jones Act does not take away from a seaman his right to enforce the *old contractual rights*, to the same extent and in the manner in which they were enforced prior to the enactment of the Jones Act, independent of any new rights or remedies which were given him under the Jones Act. The case does not hold that a seaman does not have rights under the Jones Act to recover for tortious injury resulting from the failure to perform duties imposed by law in connection with maintenance and cure. The fact that the decision stated that the rights are cumulative seems to compel an opposite conclusion. Petitioner submits, therefore, that the Circuit Court of Appeals erred in relying on that case to support its decision that Petitioner cannot recover in the instant case under the Jones Act.

POINT IV.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BASIL O'CONNOR,
JESSE L. ROSENBERG,
Counsel for Petitioner.

BASIL O'CONNOR,
JESSE L. ROSENBERG,
WILLIAM F. SNYDER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 12

RAFAEL CORTES, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF VICTOR MANUEL SANTIAGO, DECEASED, PETITIONER,

against

BALTIMORE INSULAR LINE, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

BASIL O'CONNOR,
120 *Broadway, New York City,*
JESSE L. ROSENBERG,
15 *Park Row, New York City,*
Counsel for Petitioner.

BASIL O'CONNOR,
JESSE L. ROSENBERG,
WILLIAM F. SNYDER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 12

RAFAEL CORTES, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF VICTOR MANUEL SANTIAGO, DECEASED, PETITIONER,

against

BALTIMORE INSULAR LINE, INC., RESPONDENT.

BRIEF FOR THE PETITIONER.

Opinion Below.

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 187) is reported in 52 F. (2d) 22.

Jurisdiction.

The jurisdiction of the Court rests upon Section 240 (*a*) of the Judicial Code, Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered on August 4, 1931 (R. 193). A petition for

a rehearing was denied by the Circuit Court of Appeals by an order entered December 10, 1931 (R. 202). Petition for certiorari was filed March 2, 1932, and was granted on April 11, 1932 (R. 202).

Question Presented.

The question presented is whether or not a cause of action arises under Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. § 688) (hereinafter called the "Jones Act"), for the death of a seaman resulting from the failure of a ship's officers to provide proper medical treatment and their negligent performance of other acts, thereby failing to check a curable illness which was contracted by the seaman without fault attributable to the ship or crew.

The answer depends on whether or not such neglect, although a "personal injury" within the meaning of Section 33 of the Merchant Marine Act of 1920, can be deemed "negligence" within the meaning of the Employers' Liability Act of April 22, 1908, which by incorporation into the Jones Act is made applicable to seamen.

Statutes Involved.

Section 33 of the Jones Act provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway

> employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

The relevant statute, modifying or extending the common-law right or remedy in cases of personal injury to railway employees, and conferring or regulating the right of action for death of railway employees, referred to in the Jones Act, is the Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65, 45 U. S. C. A. §§ 51, *et seq.*). Section 1 of this statute provides as follows:

> "Every common carrier by railroad while engaged in (interstate) commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 5 of this statute provides as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall

be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *."

Statement.

In October, 1928, petitioner's intestate, Victor Manuel Santiago, was a seaman on board the Steamship *Delisle* (R. 8, 117), owned and operated by respondent (R. 2, 5). On October 16, 1928, the *Delisle* left Boca Grande, Florida, and proceeded north along the coast, arriving at Carteret, New Jersey, on October 22, 1928 (R. 9, 130).

On leaving Boca Grande, Santiago became ill (R. 10). He was dangerously sick during the entire voyage north (R. 11, 17, 43, 168). After the vessel reached Carteret, he was removed to the Staten Island Marine Hospital where his condition was diagnosed as lobar pneumonia, with consolidation on both side (R. 54). He died at 8:45 A. M. on October 23, 1928 (R. 58).

Although Santiago was seriously sick on October 17, 1928, the chief mate forced him to work until about noon-time that day (R. 11). The ship had a hospital room (R. 105), but Santiago was kept in the sailors' quarters in the forecastle, which were damp, cold, unsanitary and equipped with insufficient bedding (R. 12-15, 32, 35, 38-39). No seaman was assigned to take care of him (R. 115) and the master personally did nothing for him (R. 103-104). The chief mate admitted he did not give medicine to Santiago (R. 113). The only testimony in the case which indicates that any care was given to Santiago is that of the third mate who said he gave him quinine and physics (pills)

twice a day (R. 124) and of the steward who said he gave Santiago a dose of oil in the morning and epsom salts in the afternoon (R. 158).

Although the ship went north along the coast a great part of the trip, Santiago was not put ashore. The steamer dropped anchor in the Raritan River on October 21st at 6:35 P. M. and remained there until the following morning at 6:00 (R. 112), but no medical assistance was sought or obtained. When the vessel arrived at Carteret at 8:20 A. M., no physician or anybody else was summoned to assist Santiago (R. 130). The Marine Hospital did not receive the call for an ambulance until 3:00 P. M. on that day (R. 60). The patient was reached at 4:20 and admitted to the hospital at 5:45 P. M. (R. 60).

Petitioner brought an action at law in the District Court on the theory that his intestate's death was caused by respondent's negligence. Upon a verdict of a jury, judgment was entered for petitioner (R. 178). On appeal the Circuit Court of Appeals reversed the judgment of the District Court on the ground that the Jones Act was not meant to cover such a case as the petitioner's because the duty to provide "cure" is a contractual obligation and the nonperformance of a contractual obligation cannot be deemed "negligence" within the meaning of the Employers' Liability Act, and further because a railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service and no liability would exist for injury or death resulting from a failure to furnish such treatment (R. 190-191).

Specification of Errors.

The Circuit Court of Appeals erred

(1) In holding that the failure to perform, or negligent performance of, the duty to provide "cure" to a seaman can not be deemed "negligence" within the meaning of the Employers' Liability Act which, by incorporation into the Jones Act, is made applicable to seamen;

(2) In holding that because a railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service and injury or death resulting from a failure to furnish such treatment would not give rise to a tort, injury or death resulting from the failure to furnish such treatment to a seaman would not be considered a tort under the Employers' Liability Act; and

(3) In failing to hold that the breach of the duty to provide cure to a seaman is essentially a tort and can be deemed "negligence" within the meaning of the Employers' Liability Act, or even assuming that the duty is contractual, that a breach of the duty may give rise, since the enactment of the Jones Act, to a cause of action for breach of contract and also a cause of action in tort for negligence.

Summary of Argument.

I. Unquestionably in the case at bar there was a "personal injury" within the meaning of the Jones Act. The Circuit Court of Appeals held that if a failure to treat a seaman aggravates the disease he

suffers, the aggravated condition would be a "personal injury."

Because the duty to provide cure to an injured or ill seaman has been termed a contractual obligation, although the duty is imposed by operation of law and grows out of the personal indenture created by the relation of the seaman to his vessel, the Circuit Court of Appeals has erroneously held that a breach of the duty cannot be deemed "negligence" within the meaning of the Employers' Liability Act, which by incorporation into the Jones Act is made applicable to seamen. The duties imposed by operation of law on employers on land, including railway carriers, also grow out of the master-servant relation and are implied in the contract between them. Nevertheless, the breach of any of those duties is deemed negligence, and in the case of the railway carrier the breach is deemed negligence within the meaning of the Employers' Liability Act. No difficulty whatever has arisen with regard to whether the breach should be called a tort or a breach of contract.

The courts have found no difficulty in holding that the negligent failure of the officers or crew of a ship to save a seaman who has fallen overboard through his own negligence, or without fault attributable to the officers or crew, is a tort and can be deemed negligence within the meaning of the Employers' Liability Act. Clearly such a duty is imposed by operation of law and grows out of the personal indenture created by the relation of the seaman to his vessel.

To prevent a recovery under the Jones Act by a seaman, or his personal representative, for a personal in-

jury or death resulting from the breach of the duty to provide cure because the duty is academically called contractual, would not only cause the protection given to seamen engaged upon the same maritime duties to vary with a difference in names given to the obligations imposed upon the ship, without regard to the seaman's need of protection or the diligence of the ship for the safety of its crew, but would also be an undue and unsound restriction of the meaning of "negligence," which Congress never intended. This Court has repeatedly held that the purpose of the Employers' Liability Act was to stimulate carriers to greater diligence for the safety of their employees and that the act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning.

The Employers' Liability Act denounces all contracts, rules and regulations calculated to exempt an employer from liability created by the act. That provision will be nullified by the courts themselves to the extent of liability in situations as in the case at bar, if the judgment of the Circuit Court of Appeals is affirmed.

The Circuit Court of Appeals erred in assuming that the only duties whose breach by a ship create liability under the Employers' Liability Act are those duties imposed on railway carriers and whose breach create liability under the Act. The relations between a railway carrier and an employee are so patently and fundamentally different from the relations between a vessel and a seaman that it is obvious that the duties arising by virtue of those relations are not and cannot

be identical. When the Employers' Liability Act was incorporated into the Jones Act, certainly Congress intended the railroad act to apply to duties imposed on vessels and did not intend that the act be restricted to those duties imposed on railway carriers, the sole employers included in the act when it was enacted. Clearly the Employers' Liability Act, insofar as the Jones Act is concerned, must be interpreted anew in the light of maritime conditions and duties.

Furthermore, at common law, employers, including railway carriers, were under a duty to provide emergency medical aid to an employee who sustained serious injury or illness and who was incapable of caring for himself. The employer also was under the duty of exercising care if he assumed to aid an injured or ill employee even though he had been under no original duty to furnish such aid. Breaches of these duties are torts and can be deemed "negligence" within the meaning of the Employers' Liability Act. It would be anomalous and unsound to hold that a breach of the same duties, in connection with an injured or ill seaman, would be a breach of contract and not "negligence."

II. Assuming that the duty to provide cure may be contractual, nevertheless a willful failure to perform the duty, or negligently performing the same, may be a tort as well as a breach of contract. Many cases and text writers support the proposition that frequently the foundation of an action springs out of privity of contract between the parties, but in which the remedy for the breach may be either contract or tort. The

case at bar seems to be a perfect example of such a case, where either remedy may be pursued.

III. The proofs clearly show that the death of petitioner's intestate was caused by respondent's breach of its duties. Nevertheless, it was unnecessary for petitioner to establish that the intestate's death was caused exclusively by the negligence of respondent, for the Employers' Liability Act provides that the personal representative of a deceased employee may recover if death results *in whole or in part* from the negligence of any of the officers, agents, or employees of the carrier.

The jury's verdict should not be disturbed because the evidence shows beyond dispute that respondent's breach of its duties accelerated the death of petitioner's intestate. Furthermore, where there is any evidence tending to raise an issue of fact as to the causal relation between the injury sued upon and the want of care on the part of either party, it is a question for the jury. It was for the jury to decide whether or not the intestate could have been saved if due diligence had been used.

ARGUMENT.

I.

The failure to provide "cure" to a seaman, or the negligent performance of the duty, resulting in "personal injury," is "negligence" within the meaning of the Employers' Liability Act.

The Jones Act provides that the personal representative of a seaman, who dies from "personal injury"

suffered in the course of employment, may maintain an action for damages at law. The Circuit Court of Appeals definitely held that if a failure to treat a seaman's illness aggravates the disease, the aggravated condition is a "personal injury" within the meaning of the Jones Act (R. 190). The court stated that analogies might be found in decisions under compensation statutes where acceleration of a pre-existing disease resulting in death was held to come within the term "injury".

The Jones Act further provides that in an action by the personal representative of a seaman all statutes of the United States conferring or regulating the right of action for death of railway employees shall be applicable. The statutes referred to are the Employers' Liability Act and its amendments (*supra*, p. 3).

The Circuit Court of Appeals held that the duty to provide "cure" is a contractual obligation; that nonperformance of a contractual obligation is not "negligence" within the meaning of the Employers' Liability Act; and that, therefore, the Jones Act does not cover such a case as the petitioner's.

By such a decision, the Circuit Court of Appeals is unreasonably restricting the scope of the meaning of "negligence" as used in the Employers' Liability Act and is also unduly restricting the rights of a seaman who has suffered "personal injury", within the meaning of the Jones Act.

The duty to provide maintenance and cure may be *called* a contractual obligation, but that is merely academically calling the duty a name. The duty is im-

posed by operation of law and "grows out of that which was termed in the *Montezuma* (C. C. A.), 19 F. (2d), 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel" (*Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, 137; 49 S. Ct. 75, 77). The duties imposed upon a railway carrier in connection with an employee also grow out of the contractual relation between them and might just as validly be called contractual obligations. It is obvious that without the contract there would not be the duty.

In this connection see *Elliott on Railroads* (3rd Ed.), Vol. 4, Sec. 1821, where the author says:

> "The foundation of the employer's duty is a contract of service creating the relation of employer and employee. The contract may create express duties and there are always implied duties."

In a footnote (f. n. 6) to the text in this section, the writer states:

> "The cases holding the employer liable for a failure to exercise ordinary care in furnishing a safe place in which to work and safe appliances with which to work, are familiar examples of implied duty growing out of the contract of service" (citing cases).

In *Meador* v. *Lake Shore & Mich. S. Ry. Co.,* 138 Ind. 290, 37 N. E. 721, the plaintiff sued for injury sustained in the course of his employment on the ground that the defendant was negligent in furnishing a proper ladder for plaintiff's use in his work. The court, in discussing the right of the plaintiff to bring the action, said:

> "It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish sufficient, properly constructed, and safe machinery, or other materials and appliances to be used in the course of his employment and necessary for the service" (p. 293).

In *Stafford* v. *Baltimore & O. R. Co.* (D. C. W. Va.), 262 Fed. 807, a brakeman sued the railroad company for personal injury. A plea alleging that the plaintiff, being over the age prescribed and unable to pass the physical examination required by defendants' rules, procured another who was competent to make application and take the examination and, by means of the certificate so obtained, fraudulently secured the position, was held good on motion to strike. This decision was based on the ground that there was not a master-servant relationship between plaintiff and defendant and that plaintiff, therefore, did not have the rights of a servant even though he worked for the company.

The protection the law seeks to give to an employee, especially to a seaman who requires it most, should not be denied and the statute providing a remedy unduly narrowed by technical and mere formal distinctions in nomenclature.

The Circuit Court of Appeals for the Fourth Circuit, in *Harris* v. *Pennsylvania Railroad Company,* 50 F. (2d) 866, has decided that a negligent breach of a duty, *implied in the contract of employment,* does permit a recovery under the Jones Act. The decision in that case, it is submitted, is more reasonable and more consistent with the beneficent results intended to be

created by the enactment of the Jones Act than is the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar.

In the *Harris* case, *supra*, the Circuit Court of Appeals reversed a judgment for the defendant, entered upon a directed verdict of the District Court, in an action at law by the administratrix of the estate of Harris, against the Pennsylvania Railroad Company to recover damages for the intestate's death while in the defendant's employ as a deckhand on one of defendant's car-floats.

While engaged in the performance of his duties, the intestate fell overboard and was drowned. The evidence disclosed that the members of the crew might have saved him had they used due diligence.

Two main questions were presented on the appeal:

> "(1) Whether when the seaman fell overboard by reason of his own misfortune or carelessness, and without negligence on the part of any other member of the crew, the defendant owed him a duty to rescue him from his peril; and (2) if this duty be found to exist, whether there was negligence on the part of the crew in failing to perform it" (pp. 867, 868).

The court answered the first question in the affirmative, saying:

> "* * * we have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect, falls into the sea; and that the owners are liable if, by failure to perform this duty, his life is lost" (p. 868).

On the second question the court said, page 869:

> "We think also that the evidence was sufficient to justify the submission to the jury of the issue of negligence."

After reviewing the evidence in connection with the acts of the members of the crew to save the seaman, the court said:

> "These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had been used" (p. 869).

It is obvious from this opinion that the court considered the Jones Act broad enough to permit a recovery by an administrator where the jury finds that the crew of a vessel negligently failed to perform its duty to care for a seaman or extend aid to him in an emergency, even though the duty may be implied in the contract of employment. The court branded the failure to perform such an implied duty "negligence" within the Employers' Liability Act in so far as it is made applicable to seamen.

In its opinion the court referred to *Salla* v. *Hellman* (D. C. Cal.) 7 F. (2d) 953. In that case it was held that the failure of the captain of a boat to attempt to rescue a member of a crew known to have fallen overboard was "negligence".

These cases cannot be distinguished from the case at bar on the ground that they are "accident" cases. The fact remains that the court imposed a duty upon the ship to use every reasonable means to save the

life of a seaman in an emergency, even though the emergency was not created by any fault of the ship, its officers or its crew. In the *Harris* case, *supra,* the court stated that the duty of the ship to use due diligence to save one of the crew, *both in the case of illness or injury and in the case of a seaman falling overboard*

> "* * * is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right" (pp. 868, 869).

This part of the opinion is not quoted in an attempt to assert that the doctrine of maintenance and cure was involved in the case, nor that the duty was identical with the duty imposed in the case at bar, but it does show that the duty, which was not performed in the *Harris* case, is as much contractual as the duty which was negligently performed in the case at bar. The significance of that quotation is that the court was not deterred from permitting a recovery under the Jones Act by the mere fact that the duty to render aid in the emergency might academically be called a contractual obligation. The emphasis was placed on the *saving* of the seaman when he needed assistance, as it should have been, and not on the particular type of situation which put the man in danger. To place the emphasis on the type of situation arising, rather than the personal injury resulting from the failure to

perform a duty, would lead to all manner of absurdities.

In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 47 S. Ct. 19, Mr. Justice Holmes, in referring to injuries suffered by a longshoreman employed by a stevedore, said (p. 52):

> "But words are flexible * * *. We can not believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by a ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business * * *. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the act * * *."

Nor does it seem reasonable that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the difference in the names given to duties imposed upon the ship, whose nonperformance result in personal injury to the seaman. It would be difficult to imagine that Congress intended that a sailor who steps into an open hatch that had been carelessly left open should have a remedy under the Jones Act, but a seaman who becomes desperately ill and secures no care or receives negligent treatment from the officers, who know of the seaman's condition and clearly know their duty, should

not be allowed to recover under the Jones Act; or that Congress intended to permit the representative of the sailor who fell through the open hatch, if his fall resulted in death, to recover damages under the Jones Act, but not the personal representative of the seaman who became desperately ill and was not given any care or was negligently treated by the officers, so that death resulted.

In *Jamison* v. *Encarnacion,* 281 U. S. 635, 50 Sup. Ct. 440, it was held that willful assault on a longshoreman by a foreman was negligence within the Employers' Liability Act.

Holding that a failure to perform or a negligent performance of the duty to provide cure, resulting in a personal injury to a seaman, is negligence within the meaning of the Employers' Liability Act, is no more unreasonable nor a widening of the scope of the meaning of the word "negligence" than the holding that willful assault is negligence within the meaning of that act. The holding of the former would clearly further the purposes for which the act was enacted. Mr Justice Butler in the *Jamison* case, *supra,* said the following (p. 640):

> "The act, like an earlier similar one that was held invalid because it included subjects beyond the reach of Congress, is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons. * * *"
>
> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be con-

> strued liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used. *Miller* v. *Robertson,* 266 U. S. 243, 248, 250, 45 S. Ct. 73, 69 L. Ed. 265."

Section 5 of the Employers' Liability Act makes void all contracts, rules and regulations calculated to exempt an employer from liability created by the act. The Circuit Court of Appeals in the case at bar has, in effect, gone farther than an employer could go to exempt himself from liability created by the act, since the Court has exempted an employer from liability by technically maintaining that a duty implied by law is contractual and outside the meaning of the word "negligence" as used in the act.

The Circuit Court of Appeals further reasoned that the non-performance of the duty to provide cure is not "negligence" within the meaning of the Employers' Liability Act because a railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service, and no liability would exist for death resulting from the failure to furnish such treatment. The Court further stated that if such a duty were assumed by contract, it does not think that failure to act in performance of the contract would give rise to any liability under the Employers' Liability Act (R. 191).

Assuming that the Court's statement is correct, it does not follow that under the Jones Act, which has incorporated the Employers' Liability Act, there can be no recovery for willful failure to provide medical

attention or for negligent conduct in furnishing cure to a seaman when the law has imposed upon a vessel and owner such a duty.

Since the relations between a railroad carrier and an employee are so patently and fundamentally different from the relations between a vessel and a seaman, it follows that the duties arising by virtue of those relations are not and cannot be identical. The two fields of law, in connection with these two wholly dissimilar master-servant relations, have developed along different lines. As stated by the Court in the *Harris* case, *supra* (p. 868):

> "There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. * * * If he is taken sick or is injured on board the ship, or is cast into the sea by the violence of the elements or by misfortune or negligent conduct, he is completely dependent for care and safety upon such succor as may be given by the members of the crew. By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land."

It is obvious that the Employers' Liability Act was specifically designed by Congress to apply to conditions as they obtain on railroads. The difficulty now appears to be to relate such a statute, not specifically designed to apply to any other conditions, to conditions obtaining on navigable waters. It is reasonable

to assume, therefore, that when the Employers' Liability Act was incorporated into the Jones Act, it was intended to apply to the peculiar situations arising and duties applying on navigable waters, and not to those situations arising or duties applying in railway cases. To make sense, it must be construed and interpreted in the light of existing *maritime law*—not railroad law. Petitioner submits that the Circuit Court of Appeals erred in assuming that the only duties whose breaches create liability under the Jones Act are those arising by virtue of the master-servant relation on railroads.

Although it may be true that there is no general duty resting upon a railroad to provide medical attendance upon an employee, during incapacity, who becomes ill in the course of his employment (obviously because there is no necessity for imposing such a duty upon the master in the case of employment on land), nevertheless, when in the course of his employment, a servant sustains serious injury or illness and is in a helpless condition so that he is incapable of aiding himself, creating an immediate and urgent need for medical attention to save his life, it is the common-law duty of the master, including especially railroads, to provide such emergency medical aid, and for negligence in providing such aid or negligent non-performance of his duty, the master is liable for damages in case death ensues as the proximate result of such negligence. The authorities make no distinction in cases where the primary injury or illness occurred without negligence on the master's part. See *Atchi-*

son, T. & S. F. Ry. Co. v. *Hix* (Tex. Civ. App.), 291 S. W. 281, 284.

In *Baker* v *Adkins* (Tex. Civ. App.), 278 S. W. 272, an action was instituted by an administratrix against the receiver of the International and Great Northern Ry. Company and the railway company itself for damages suffered as the result of the death of the deceased, caused by the receiver's alleged negligence. The complaint alleged that the deceased, while working on the railway, was stricken with smallpox; that he was placed in a car which had been used by employees as sleeping quarters and that he remained there until his death, which was brought about by the defendants' negligence in not giving him proper treatment; that the car became very insanitary and unclean; and that other wrongful acts of the defendants greatly aggravated his illness. The cause was submitted to a jury through special issues, all of which were answered favorably to the plaintiff. The Court then rendered judgment in favor of plaintiff.

On appeal, the Court of Civil Appeals held that: (1) it approved the doctrine that a railway company was under a duty to care for an employee suddenly stricken ill or injured while serving his master; and (2) since the railway company assumed the duty of caring for the deceased, it should have done so in a reasonably careful and competent manner,

> "and if negligent cannot hide itself behind the cruel plea of such care being outside of its chartered duties" (p. 276).

In *Carey* v. *Davis et al.*, 190 Iowa 720, 180 N. W. 889, the plaintiff alleged that he was overcome by heat while

working for the defendants as a farm laborer; that the defendants laid him in a wagon box at or near the place where he had been at work; and that they left him there in an even more exposed condition, without care or protection, for a period of four hours or more. Plaintiff charged defendants with negligence in *failing* to give him reasonable care and in aggravating his suffering by exposing him to the rays of the sun. No claim was made that plaintiff's prostration was caused by the negligence of defendants.

Defendants demurred on the ground that there was no actionable negligence on their part and no duty to give relief. The demurrer was sustained in the District Court and judgment entered in defendants' favor. On appeal to the Supreme Court the judgment was reversed.

In its opinion the court said (p. 723):

> "* * * there is a tendency of the courts to hold that where, in the course of his employment, a servant suffers serious injury, or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm, the master, if present, is in duty bound to take such reasonable measures or make such reasonable effort as may be practicable to relieve him, even though such master be not chargeable with fault in bringing about the emergency."

In *Northern Central Railway Co.* v. *The State, etc.*, 29 Md. 420, the plaintiff sued for the benefit of the next of kin of a deceased person, who was hit by a train of the defendant at a crossing. After the accident the

deceased was put in a warehouse, which was then locked. The next morning it was found that the injured person had recently died, as he was still warm, and that during the night he had moved from the place where he had been laid. The court held that the railroad's conduct constituted gross negligence on the ground that when the injured person was found, whatever the cause of the collision may have been, it thereupon became the duty of defendant's agents to remove him and to do it with proper regard for his safety. The judgment for plaintiff was affirmed.

See also: *Troutman's Adm'x* v. *Louisville & Nashville R. Co.*, 179 Ky. 145, 200 S. W. 488; *Terre Haute & Indianapolis R. Co.* v. *McMurray*, 98 Ind. 358; *Raasch* v. *Elite Laundry Co.*, 98 Minn. 357, 108 N. W. 477; *Pullman Co.* v. *Montimore*, 17 F. (2d) 2 (C. C. A., 5th), certiorari denied 274 U. S. 746, 47 S. Ct. 659; *Fontanella* v. *N. Y. Cent. R. Co.*, 186 App. Div. 588, 174 N. Y. S. 537, Aff'd, 228 N. Y. 546.

In the *Troutman* case, *supra*, the court, in discussing on what ground to rest the liability of the master in cases like these, said the obligation grows out of the *relation of master and servant* (p. 156).

Furthermore, even if the master is not under an original obligation to give medical attention or treatment to an injured or sick employee, if he undertakes in an emergency the relief of a sick or injured employee, he is bound to exercise reasonable care so that the sickness of or injury to the employee shall not be increased and his life endangered. See *Atchison, T. & S. F. Ry. Co.* v. *Hix*, *supra* (p. 284).

In *Neil* v. *Flynn Lumber Co.*, 71 W. Va. 708, 77 S. E. 324, the plaintiff was injured while in the employ of the defendant and sought recovery for injury sustained through the negligence of a person employed by defendant to attend and treat him. Plaintiff alleged an express contract whereby the defendant, in consideration of monthly deductions from plaintiff's wages, agreed in the event of sickness or accident to furnish for plaintiff's treatment a skilled physician. Plaintiff alleged that defendant failed to furnish a skilled physician to treat him but did furnish a person who so unskillfully and negligently conducted himself that plaintiff's injuries were aggravated. Defendant's demurrer was sustained by the lower court. On appeal the Supreme Court of Appeals reversed.

The main question was whether or not plaintiff elected an improper form of action, having sued in tort. The court first found that plaintiff set out a cause of action, taking the facts to be true as alleged, because there is a liability on the employer unless, in pursuance of its undertaking, it exercises reasonable care. The court then held that plaintiff could sue in tort or in contract—in tort because negligence was the proximate cause of the injury.

In *Crawford* v. *Davis, Director General*, 136 S. C. 95, 134 S. E. 247, the plaintiff sued for personal injuries suffered through the negligent treatment of a physician to whom plaintiff was sent by a foreman of the Southern Railway Company after plaintiff had been injured in the course of his employment. There was no question in the case as to negligence in connection with the

original injury. Judgment for plaintiff was affirmed on the ground that an employer undertaking to care for an injured employee, where no duty exists to do so, is bound to the same measure of care as if the duty existed.

See also *Karabalis* v. *E. I. DuPont de Nemours and Co.*, 129 Va. 151, 105 S. E. 755.

It seems clear that the master's negligent failure to perform the common-law obligations to furnish emergency treatment to an injured or ill employee suffering such illness or injury in the course of his employment, although without negligence on the part of the employer, and the master's failure to act carefully when he has undertaken to treat the injured or ill employee, is "negligence" within the meaning of the Employers' Liability Act.

In *Crawford* v. *Davis, Director General, supra,* the act of the defendant complained of was considered an act without any elements of interstate commerce and therefore it was stated that the Federal Employers' Liability Act was not applicable. However, the court did say (p. 108):

> "It may be stated further that, even if the case were under the Federal Employers' Liability Act, the result would not be different; for, as stated in the citations *supra,* the Act is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein. 'The words "suffering injury" are not confined to injuries which are attended with force or violence, etc.' "

In *Atchison, T. & S. F. Ry. Co.* v. *Hix, supra,* the court said (p. 284):

> "Appellant's first insistence is that there can be no recovery, under the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries resulting in death, the employer not being liable for the primary injury.
>
> "This question, under the Federal Employers' Liability Act, has never been passed upon so far as we are advised, but has been considered in a number of cases by state courts in cases arising under the death by wrongful act statutes of such states."

The court then states the two common-law duties of a master to furnish medical attention in an emergency to an injured or ill employee and to act with reasonable care if the master undertakes the relief of a sick or injured employee, citing cases in support thereof. The court then continues (p. 284):

> "In our opinion there is nothing in the language of the Federal Employers' Liability Act which excludes the application of these two grounds of liability in the case of an employee injured while engaged in interstate commerce. There being no ruling by the Federal courts upon the question, we are at liberty to hold and do hold that such liability attaches to the master in a proper case arising under the act."

In *De Atley* v. *Chesapeake & Ohio Ry. Co.,* 201 Fed. 591 (D. C. Ky.) it was held that the Employers' Liability Act covers any and all negligent acts for which

a carrier could be liable to an employee under the common law.

Thus, in view of the above, we should then have the patent and unsound anomaly of permitting the railway employee or his personal representative to recover damages for the carrier's negligence within the meaning of the Employers' Liability Act and the denial of such a recovery, under the Circuit Court of Appeals' ruling, to a seaman injured in the same way, and this for no other reason than that the cause of action in the case of the railroad employee is rightfully considered a tort but in the case of a seaman the cause of action is academically considered in contract, although unquestionably both duties which were negligently performed, giving rise to the causes of action, grew out of the master-servant relationship.

It is obvious that every remedy given to a seaman under the Jones Act arises by virtue of the contractual relation. The following quotation is from *Benedict on Admiralty* (5th Ed.), Vol. 1, Sec. 25, p. 32, referring to the Jones Act:

> "* * * assuredly the intention of Congress was to annex the remedy to the contract of employment and not to confine it, as if independent of contractual relation, within the bounds of maritime tort, particularly as the remedy is given at law."

II.

Assuming that the duty to provide cure may be contractual, nevertheless a willful failure to perform the duty, or negligently performing the duty, may be a tort as well as a breach of contract.

There is abundant authority for the proposition that a tort may grow out of or be coincident with a contract.

In *Neil* v. *Flynn Lumber Co., supra,* where the plaintiff recovered in tort for negligent treatment of his injury, the treatment having been furnished pursuant to a contract between the employer and employee, the court reviewed many cases from several jurisdictions holding that the plaintiff could sue either in contract or tort. In this connection the court said (p. 715):

> "In a large class of cases, embracing carriers of passengers and goods, telegraph companies, and all contracts of service, professional or otherwise, there is a duty implied by law to exercise the commensurate degree of care required, a breach of which entails liability either on contract or in tort. In these cases, as in the one at bar, negligence is the proximate cause of the injury."

In *Boorman* v. *Brown,* 3 Q. B. 511, 2 G. & D. 793, 114 Eng. Reprint 603, Aff'd 11 Cl. & F. 1, 8 Eng. Reprint 1003, the plaintiff sued the defendant, who had been hired as broker and to whom plaintiff had consigned goods for delivery to a third person under a contract of sale, in tort, alleging that defendant was

under a duty to use reasonable care that the goods should not be delivered to the purchaser without the price being paid to defendant according to the contract, but that by defendant's carelessness the goods were delivered without the price being paid. After a verdict for plaintiff, the Court of Queen's Bench arrested judgment, which was reversed by the Court of Exchequer Chamber on the ground that for the breach of such a duty an action of tort lay.

Tindal, C. J., speaking for the court, said (pp. 525, 526):

> "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed, * * * and, as to the objection that this election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance * * *."

After giving examples where tort lay for nonfeasance, the court continued:

> "The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort."

In discussing how the duty arose, the court said (p. 527):

> "* * * the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration."

In *Attleboro Mfg. Co.* v. *Frankfort Marine, etc. Ins. Co.* (C. C. A. 1st), 240 Fed. 573, the plaintiff sued the defendant insurance company in tort for the recovery of damages caused plaintiff by the negligent defense by the insurance company of the action instituted by one of plaintiff's employees for damages suffered as the result of an injury sustained in plaintiff's plant.

The relationship between the parties giving rise to the tort complained of was established by the contract of insurance, several provisions of which plaintiff pleaded. The defendant contended that the cause of action was in contract and not in tort. The Circuit Court overruled that contention, saying in part (p. 579):

> "The plaintiff does not seek in any of the counts to recover damages for a breach of contract, and the contract is not set out for the purpose of showing that its obligations have been broken by the defendant. The allegations of this character were made for the purpose of showing the relationship existing between the parties, and the rights of the plaintiff in the subject-matter as to which the defendant was dealing and which it was bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law."

As in the above case, last cited, the relationship between the parties in the case at bar was created by contract out of which grew duties imposed by law, which respondent was "bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law." A failure to use due care in the performance of those duties or a willful failure to perform them clearly constitutes "negligence" or a tort.

In *The Western States* (D. C. N. Y.), 151 Fed. 929 (aff'd 159 Fed. 354), the court said (p. 930):

> "The law is unquestionably well settled that the carrier, in addition to the obligations above mentioned which it owes to the passengers, must also use the utmost care to accord to a passenger respectful treatment by its officers and servants. Upon the facts elicited, the jury was warranted in finding that after the assault the libelant, who made report thereof to the master of the vessel and to the special watchman, was treated disrespectfully. The skeptical manner in which her complaint that she had been chloroformed, assaulted, and robbed was listened to, together with the evident lack of sympathy displayed, without doubt augmented her sufferings. *Such tortious acts following the assault upon her were a breach of the contract, and were properly considered by the jury in aggravation of damages.* The *La Gascogne* (D. C.), 135 Fed. 577; *The Willamette Valley* (D. C.), 76 Fed. 838; *Gillespie* v. *Brooklyn Heights R. R., supra.*" (Italics ours.)

In *Dean* v. *McLean,* 48 Vt. 412, it was held that the defendant who had contracted for running his logs over plaintiff's mill-dam and had agreed to repair and pay all damages done, might be sued in case for negligent injury to the dam.

In *Lane* v. *Boicourt,* 128 Ind. 420, 27 N. E. 1111, it was held that for malpractice by a physician an action in either contract or tort would lie.

The case of the common carrier furnishes the most conspicuous illustration of liability in tort or contract through a failure to perform duties which have arisen by virtue of the relations created by contract. A passenger injured as a result of the carrier's negligence may sue in tort or in contract for a breach of the contact of carriage. See *Gillespie* v. *Brooklyn Heights R. R. Co.,* 178 N. Y. 347, 70 N. E. 857; *Busch* v. *Interborough R. T. Co.,* 187 N. Y. 388, 80 N. E. 197.

See also:

Owens Bros. v. *Chicago, R. I. & P. Ry. Co.,* 139 Iowa 538, 117 N. W. 762;

Flessher v. *Carstens Packing Co.,* 93 Wash. 48, 160 P. 14;

Franklin Fire Ins. Co. of Philadelphia v. *Weinberg,* 110 Misc. 644, 181 N. Y. S. 15;

Cooley on Torts, 4th Edition, Vol. 1, Sec. 60.

Although the duty to provide cure may be called a contractual obligation, it is a duty implied by law growing out of the master-servant relationship, and, in view of the above decisions, a failure to perform the duty or careless performance of the same may

give rise to a tort action as well as an action for breach of contract. Furthermore, the contractual relation between the ship and the seaman and the imposition of the duty to provide cure gives rise to the additional duties, since the enactment of the Jones Act, to give to a seaman medical attention if he becomes seriously ill or injured and to act with due care once the officers of the vessel have assumed to act, and the breach thereof is "negligence" within the meaning of the Employers' Liability Act.

III.

The proofs clearly show that the death of petitioner's intestate was caused by respondent's breach of its duties.

It may be assumed that in the jury's opinion petitioner has proved that respondent's nonfeasance and misfeasance were the proximate cause of the death of petitioner's intestate.

The Circuit Court of Appeals, while assuming for the purpose of its discussion a causal relationship between respondent's failure to perform its duties and the seaman's death, since it was unnecessary for the court to review the question of proximate causation in view of the fact that the court reversed the judgment of the District Court on other grounds, nevertheless did say that

> "• • • we must take it that the defendant failed to give Santiago the care he should have been given during his illness. The evidence would not, in our opinion, sustain a verdict

> based on the theory that any affirmative acts of the defendant's agents caused his death, but it might justify a finding that the defendant omitted performance of its maritime duty to provide 'cure' to the sick seaman, in that it failed to land him at some port on the voyage north, or to furnish more expert medical treatment on board, or to get him promptly to a hospital on arrival of the vessel at the port of New York" (R. 188-189).

It is almost impossible to imagine a case where greater negligence and causal relationship between the negligence and a seaman's death could be shown. This Court, in *The Iroquois,* 194 U. S. 240, 24 S. Ct. 640, made clear what the duties of a ship to its seamen are in cases such as the one at bar. In that case, this Court held that it was negligence not to divert the ship six hundred miles off its course with a week's sacrifice of time so as to call at Valparaiso on the ship's voyage around the Horn to San Francisco, in order to obtain hospital aid for a seaman who had suffered a fractured leg.

Mr. Justice Brown, on pages 246, 247, said:

> "We have no criticism to make of the treatment of libelant immediately following the injury, except that we think he should have been taken into the cabin, where he could have been more comfortably provided for. * * * It is true the libelant said the bones were not united, but he does not seem to have complained of this to the master; yet with a careful examination, such as the master was bound to

> make, we think he should have detected it. * * *
> "* * * He was a boy, largely ignorant of his rights and duties. The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not. * * * To put it in a light most favorable to the master, he speculated upon the chance that the union of the bones had taken place without seeking to inform himself of the fact. The courts below held that the master did not discharge, as he should have done, the claim of humanity which the serious nature of the injury and the helpless condition of the libelant imposed upon him."

It follows that in view of the facts and the opinion of this Court in the *Iroquois* case, *supra,* there can be no question regarding the gross negligence of the ship's officers and crew in the case at bar resulting in "personal injury" and death of the deceased.

It is clear that petitioner's intestate's death was caused in whole or in part by respondent's negligence. The Employers' Liability Act provides that the carrier shall be liable in case of the death of an employee to his personal representative for

> "* * * death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier * * *." (Italic ours.)

If the injury or death was caused "in whole or in part" by the employer's negligence, the statute cannot be nullified and the right of recovery defeated by call-

ing a plaintiff's act the proximate cause of the injury.

Illinois Central R. Co. v. *Skaggs,* 240 U. S. 66, 36 S. Ct. 249;

Spokane & I. E. R. Co. v. *Campbell* (C. C. A. 9th), 217 Fed. 518.

The jury's verdict shows that to their minds there was a causal relation between respondent's negligence and the death of petitioner's intestate. The verdict should not be disturbed, because where there is any evidence tending to raise an issue of fact as to the causal relation between the injury sued upon and the want of care on the part of either party, it is a question for the jury.

Minneapolis, St. P. & S. S. M. Ry. Co. v. *Goneau,* 269 U. S. 406, 46 S. Ct. 129;

Dahlen v. *Hines* (C. C. A. 7th), 275 Fed. 817.

In the *Harris* case, *supra,* the Circuit Court of Appeals, in reviewing the correctness of the lower court's refusal to send the case to the jury, said, after a discussion of the facts of the case (p. 869):

> "These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had been used."

It is clear that in the case at bar it was also for the jury to decide whether petitioner's intestate could have been saved if due diligence had been used.

CONCLUSION.

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted,

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September, 1932.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 12

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 752.

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The complaint herein charges failure of the officers of the ship to give Santiago any medical attention, to obtain assistance from passing vessels, to provide heat and proper quarters, place him in a hospital room and to provide proper food or medicines (all of them alleged sins of omission), and that his death was caused by reason of the negligence of the defendant.

The suit was brought under Section 33 of the Merchant Marine Act of 1920, known as the Jones Act, and not under any State death statute or under the Federal death act, none of which could properly be applied under the facts alleged in the complaint.

On October 17, 1928, the day after sailing from Boca Grande, Florida, the officers of the ship first learned that Santiago felt ill. He was kept in the forecastle and not put in the hospital room aft, intended for contagious diseases, which required segregation from the crew, because he could get better care forward (R. 125). The weather on the voyage north was fine (R. 119). The temperature averaged about 80° until the afternoon of October 20th and thereafter until the vessel arrived in New York Harbor on the evening of October 21st, ranged from 60° to 78° (R. 217). The steamer arrived at the mouth of the Raritan River on October 21st at about 6:35 P. M. (R. 138) and lay all night at anchor and reached her dock at Cartaret, New Jersey, the following morning. An ambulance was summoned from the Staten Island Marine Hospital and arrived at 4:20 P. M. in the afternoon (R. 75). Santiago's case was diagnosed as lobar pneumonia, with consolidation on both sides, and he died the following day (R. 68).

The thermometer readings dispose of the charge of cold quarters and insufficient bedding. All the witnesses agreed that he had a blanket, described by one witness as heavy (R. 21, 50, 103). He had in addition a bed spread and two sheets and an extra blanket not used (R. 103, 200, 196, 156, 191).

The charge of lack of proper or insufficient food is disposed of by the undisputed testimony that he received a little coffee, soup, bread and orange juice.

The charge of failure to obtain aid from passing vessels or to obtain prompt medical assistance on arrival is disposed of under Point IV hereof.

We might add that it is not surprising that the officers diagnosed the trouble first as seasickness and then as grippe or malaria when we consider that the

temperature averaged 80° when Santiago first became ill and when both the master and third mate saw Santiago walking on deck on October 21st, the day of arrival off Staten Island (R. 123, 153).

POINT I.

A careful analysis of the decision in the case at bar and that in *Harris* v. *Pennsylvania Railroad Company*, 50 F. (2d) 866 (C. C. A., 4th Circ.), discloses that there is no conflict of decision or authority between the Circuit Courts of Appeals for the Second and Fourth Circuits in respect to Section 33 of the Merchant Marine Act of 1920.

In the case of *Harris* v. *Pennsylvania Railroad Co.*, 50 F. (2d) 866, the decedent fell overboard from a car float and was drowned. At the close of the plaintiff's case in the District Court defendant moved for a directed verdict which was granted by the District Judge, who held that it was the duty of the defendant to exercise reasonable diligence to save the deceased, but that even if there were lack of such diligence, nevertheless there was no evidence from which the jury could reasonably conclude that more diligent action on the part of defendant's servants could have saved their comrade's life. The Circuit Court of Appeals (4th Circuit) stated that two main questions were presented:

> "(1) Whether when the seaman fell overboard by reason of his own misfortune or carelessness, and without negligence on the part of any other member of the crew, the defendant owed him a duty to rescue him from his peril; and (2) if this

duty be found to exist, whether there was negligence on the part of the crew in failing to perform it" (pp. 867, 868).

The Court further stated that it had been referred to no decisions involving the bald question presented, although cases were cited in which the negligent failure of a ship's crew to save a drowning seaman had been treated as a material circumstance in determining the obligation of the vessel, and referred to *Salla* v. *Hellman* (D. C., S. D. Cal.) 7 F. (2d) 953, and *Newport News S. B. & D. D. Co.* v. *Watson* (C. C. A. 4th Circ.), 19 F. (2d) 832, 833.

In *Salla* v. *Hellman,* it was held that the failure of the Captain of the boat to attempt to rescue a member of the crew known to have fallen overboard was negligence and a recovery could be had under the Act of March 30, 1920.

In *Newport News Shipbuilding and Drydock* v. *Watson,* the Court held that where the engineer of a launch caused it to bump against a scow and a fellow employee fell overboard and was drowned, the engineer was negligent in having his back turned when the launch struck the scow, and also in failing to get the launch in motion in time to rescue the drowning man, and that his negligence rendered the employer liable under Section 33 of the Merchant Marine Act of 1920.

Therefore, in neither *Harris* v. *Pennsylvania Railroad Company* nor in the two above cases cited by the Court in the *Harris* case was the doctrine of maintenance and cure involved and none of them dealt with a case of illness, but each dealt with a case of accident, personal

injury, and negligence. All three cases were patently what are known in the law as "accident cases", "personal injury cases" and "negligence cases" as distinguished from cases of illness and cure.

It is true that the Court in the *Harris* case adverted to the rule of maintenance and cure in admiralty but such adversion was not at all necessary to its decision, and it had already been held that in personal injury cases arising out of accidental drowning, the shipowner owed a duty to the seaman to try to save his life.

Whatever, therefore, was said by the Court with reference to maintenance and cure was *obiter dictum* and not a necessary part of its decision, and therefore not binding even on that Court in a subsequent case and of course not binding on any other Court.

What the Circuit Court of Appeals for the Second Circuit in the case at bar held was that an action for failure to furnish cure in a case of illness was under the maritime law based upon contract and was not a personal injury case based on negligence, and therefore could not be based on Section 33 of the Jones Act. In its opinion the Circuit Court of Appeals said (R. 238):

> "At the conclusion of the evidence, the jury found for the plaintiff; and, since the record is not entirely barren of evidence to support some of the charges, we must take it that the defendant failed to give Santiago the care he should have been given during his illness. The evidence would not, in our opinion, sustain a verdict based on the theory that any affirmative acts of the defendant's agents caused his death, but it might justify a finding that the defendant omitted performance of its maritime duty to provide 'cure'

> to the sick seaman, in that it failed to land him at some port on the voyage north, or to furnish more expert medical treatment on board, or to get him promptly to a hospital on arrival of the vessel at the port of New York. We shall assume for purposes of our discussion a causal relationship between such omission by the defendant and the sailor's death."
>
> (We point out that the Court did not find but only assumed for discussion that there was any causal relationship between the omission of performance by the defendant and the death of Santiago.)

It held (R. 240) that the duty to provide cure is a contractual obligation and that non-performance thereof cannot be deemed negligence within the meaning of the Federal Employers' Liability Act and therefore of the Jones Act; that one, and perhaps the chief purpose of both, was to abrogate the fellow-servant doctrine in respect to injury or death resulting from tortious acts of the carrier's servants; and finally held (R. 242):

> "For reasons already stated, we are of opinion that the Jones Act does not provide a remedy for death resulting from an illness which occurred without fault on the part of the ship but was aggravated by a failure to perform the ship's maritime duty to provide cure. The paucity of authority on this question is itself somewhat persuasive that the statute should not be construed as the plaintiff contends. See *The City of Alexandria* (D. C. 17 F. 390, 395)."

When the two cases and the Statutes are thus carefully analyzed it will be seen that there is no conflict of

decision between the two courts calling for the intervention of this Court. Even if there be a conflict in reasoning, such would not call for review.

POINT II.

The Jones Act, Section 33, does not provide a remedy for death resulting from an illness occurring without fault on the part of the ship, even assuming that it was aggravated by a failure to perform the ship's maritime obligation to provide cure.

Under the admiralty law no remedy was given for death on the high seas until the Death on the High Seas Act was passed by Congress March 30, 1920 (41 Stat. 537) and the passage of Section 33 of the Merchant Marine Act of June 5, 1920, frequently known as the Jones Act. Likewise no remedy was given to a seaman for injuries caused by negligence of the officers or other members of the crew as distinguished from unseaworthiness of the ship. The whole purpose of the Jones Act was to give a remedy in such negligence cases and to abolish the fellow-servant rule in the case of seamen in "personal injury", "accident" or "negligence" cases, which had been ineffectually attempted in Section 20 of the Seamen's Act of 1915 (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372). It is clear that it was not the purpose of the Act to affect or deal in any way with the doctrine of maintenance and cure, which had an entirely separate basis in the admiralty.

Section 33 of the Jones Act provides as follows:

"That any seaman who shall suffer personal

injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

The relevant statute, regulating the right of action in cases of personal injury to or death of railway employees, referred to in the above statute, Section 33, is the Employer's Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65, U. S. C. A., Title 45, Sec. 51, Section 1 of which provides:

"Every common carrier by railroad while engaged in (interstate)- commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65)."

The history in Congress of Section 33 of the Merchant Marine Act, amendment of 1920, or Jones Act, plainly indicates that there was no intent to change the doctrine of maintenance and cure or to change the maritime law in any way except in cases of *personal injury* or *death* arising out of *accident* aboard ship.

If Congress had so intended it would have been a simple matter in drafting the Jones Act to have added the words "or illness" to make the section read:

> "That any seaman who shall suffer personal injury *or illness* in the course of his employment * * *; and in case of the death of any seaman as a result of any such personal injury *or illness* * * *."

The omission of the word "illness" from the statute was certainly not accidental. What Congress and the proponents of the Section intended was only that seamen should be placed in as favorable a position as railroad employees in personal injury or accident cases, based on tortious negligence.

The amendment of 1920 (Section 33) was proposed by the Senate to the original House of Representatives bill (H. R. 10378) and was adopted with no material changes. The language was proposed by Mr. Furuseth who was attending hearings before the Senate Committee in his capacity as President of the International Seamen's Union of North America. The following is an excerpt from the report of the hearing held on February 27, 1920 (Commerce Committee Hearings, 66th Congress, p. 1712):

> "The Chairman: (Senator Jones) 'What is the amendment you suggest to Section 20 (of the Seamen's Act of 1915).'

Mr. Furuseth: 'That any seaman who shall suffer personal injury in the course of his employment, may at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.'

Senator Fletcher: 'In other words under the the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy.'

Mr. Furuseth: 'He would have no remedy.'

Senator Fletcher: 'And now you want to change that so he would have a remedy provided that his own negligence did not bring about the injury.'

Mr. Furuseth: 'That is it exactly.'"

The report of the Managers for the House of Representatives in commenting on the Senate's amendment (No. 139) states:

> "This amendment amends Section 20 of the Seamen's Act so as to extend the Federal Employers' Liability Act to cases of personal injury *to or death of* seamen" (Cong. Record, Vol. 59, part 8, p. 8409, 66th Cong., 2nd Session, June 3, 1920).

Had Congress intended to provide in the *Jones Act* a death statute comprehensive enough to cover all cases whether arising by reason of tort or contract, it would have been a simple matter to use the broad language contained in *"An act relating to the maintenance of actions for death on the high seas"* (Mar. 30, 1920, c. 111, §1, 41 Stat. 537). In this Act, passed less than three months before the *Jones Act,* the language used is

> "Whenever the death of a person shall be caused by wrongful act, neglect *or default* occurring on the high seas * * * the personal representative of the decedent may maintain a suit for damages * * * against the vessel, person or corporation which would have been liable if death had not ensued." (Italics ours.)

The words "or default" could be properly construed to cover liability for failure to comply with a contractual duty to provide medical treatment. It is certainly significant on the question of the intent of Congress, that the *Jones Act,* dealing with a closely related subject, does not include the comprehensive language of the "Death on the high seas" Act.

In *Lindgren, Admr.* v. *The United States,* 281 U. S. 38, this Court, speaking of the Jones Act, Section 33, said:

> "By this act, as heretofore construed by this court, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Federal Employers' Liability Act and its amendments, and permitting these new and substantive rights to be asserted and enforced in actions *in personam* against the employers in Fed-

eral and State courts administering common law remedies, or, in suits in Admiralty, in courts administering maritime remedies.

* * * * * * *

1. Prior to the adoption of the Merchant Marine Act the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. See *The Harrisburg,* 119 U. S. 199; *The Osceola,* 189 U. S. 158, 175; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240.

* * * * * * *

By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted *from personal injuries* the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act." (Italics ours.)

In *Pacific Steamship Co.* v. *Peterson,* 278 U. S. 130, this Court decided that the election given to seamen by the *Jones Act* is between an action to recover compensatory damages under the new rule for injuries caused by negligence and a suit to recover indemnity under the old rules for injuries occasioned by unseaworthiness, saying (pp. 136-139):

"Plainly, we think, the right under the new rule to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages—which arises, quite independently of negligence, when the seaman falls sick or is injured

in the service of the ship, and grows out of that which was termed in *The Montezuma* (C. C. A.), 19 F. (2d) 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel. * * * In short, the right to maintenance, cure and wages, implied in law as a contractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative.

The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, *both grounded on tort,* that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. But, whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, *Baltimore S. S. Co.* v. *Phillips, supra,* 321, for which he is entitled to but one indemnity by way of compensatory damages.

Considered in the light of these several remedies and the extent of the inconsistency between them, we agree with the view expressed by the Supreme Court of Washington *that the statute*

was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages—to which it made no reference. And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; and *that no election is required between the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, care and wages* under the old rules—the latter being a cumulative right in no sense inconsistent with, or an alternative of, the right to recover compensatory damages." (Italics ours.)

It seems clear from the foregoing that this Court considered that it was not the intention of Congress in the *Jones Act* to interfere with the long-established rules of "maintenance and cure" for seamen in cases of illness or accident.

In *Persson* v. *Gulf Refining Co.*, 228 App. Div. 366, a seaman brought suit for indemnity on two causes of action, the first for negligence in causing his injuries; the second for failing to provide him with cure for his injuries. Both Trial Court and the Appellate Division treated the first cause of action as under the Jones Act, and the second as wholly under the old maritime law. On appeal defendant assigned error in that plaintiff was not compelled to elect between the two. Held, that plaintiff could not be compelled to elect between the two causes of action, the first being under the Jones Act and

the second for compensatory damages for breach of the defendant's obligation to furnish to the plaintiff cure with reasonable promptness. The decision clearly indicates that neither of the Courts considered the cause of action for failure to provide a cure to be based on the Jones Act.

That the scope of relief under the Jones Act is limited by its terms to cases defined in the Employers' Liability Act, likewise appears from the decision of this Court in *Jamison* v. *Encarnacion*, 281 U. S. 635. In that case a longshoreman assaulted by his gang boss in the supposed course of his duties brought suit under the Jones Act. This Court stated (p. 639):

> "He is entitled to recover if within the meaning of Section 1 (of the Employers' Liability Act) his injuries resulted from the negligence of the foreman.
>
> The question is whether 'negligence' as there used includes the assault in question.
>
> The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault or negligence of fellow servants and applies the principle of *respondeat superior* (Sec. 1), eliminates the defense of contributory negligence and substitutes a rule of comparative negligence (Sec. 3), abolishes the defense of assumption of risk where the violation of a statute enacted for the safety of employees is a contributing cause (Sec. 4) and denounces all contracts, rules and regulations calculated to exempt the employer from liability created by the Act. Sec. 5.

> The reports of the House and Senate committees having the bill in charge condemn the fellow-servant rule as operating unjustly when applied to modern conditions in actions against carriers to recover damages for injury or death of their employees and show that a complete abrogation of that rule was intended."

The case at bar is based on the alleged non-performance of a duty to land plaintiff at some port or furnish medical treatment, or to take him to the hospital sooner than he was taken. Such charges are based on the theory that a contractual obligation was not performed.

In *Morris* v. *U. S.*, 3 F. (2d) 588, 591 (C. C. A., 2nd Circuit) a seaman suffered a hernia. No medical attendance was given him and he was not put ashore at an intermediate port where the vessel stopped. The Court said (p. 591):

> "Indeed, it was the duty of the captain of the vessel to obtain medical aid at the intermediate port of the Azores for the injured seaman if he had no means of affording medical attention on board. * * * Even though the captain was mistaken, and committed an error of judgment in believing that the appellant was shamming, this fact does not relieve the ship from the responsibility it owed to the seaman. *Unica* v. *U. S. supra.* The consequential damage due to the failure to afford medical aid and maintenance is a measure of damages which is to be awarded. Recoveries have been permitted for neglect to furnish the proper medical care and treatment in actions instituted for consequential damages. * * * The right of recovery for maintenance and cure

> does not allow recovery for pain and suffering or compensation for injury due to physical incapacity. * * * A right of action for damage for maltreatment is not pleaded here."

Obviously in the opinion of the Court the cause of action was founded on breach of a contract obligation rather than on a tort for two reasons: First because it held that even though the captain was only mistaken and committed an error of judgment (*i. e.,* even if there were no negligence), nevertheless, the ship was not relieved from the obligation to furnish cure; and second, because in a tort action recovery for pain and suffering would be allowed, whereas it was disallowed by the court for the reason that the remedy for maintenance and cure does not allow it.

The cause of action arose subsequent to the *Jones Act* and the libel was *in personam.* The Court could therefore have applied the *Jones Act* had it considered the cause of action as one founded in tort.

In *The Hanna Nielsen,* 273 F. 171 (C. C. A., 2d Circ.) a libel was filed by a seaman on a Norwegian vessel for injuries and/or cure and maintenance. The District Court dismissed the claim for injuries but allowed cure and maintenance. The Circuit Court of Appeals directed the dismissal of the libel *in toto* on the ground that the right to cure and maintenance was contractual and therefore governed by the Norwegian law, with which it had been proved the ship complied.

In *Cresci* v. *Standard Fisheries et al.,* 7 F. (2d) 378, (N. D. Cal.) Kerrigan, *J.*, held that a seaman's libel for wages, maintenance and cure was based on contract and therefore was not barred by the statute of limitations

of California, Section 340, sub-division 3, prescribing one year limitation for tort actions such as actions for injury to or for the death of one caused by wrongful act or neglect, saying (pp. 378, 379):

> "The latter (actions for maintenance and cure) are, as stated, in reality actions for breach of contract. Although the articles may be wholly silent upon such points, law and reason imply certain obligations on the part of the master and owner to the mariner, which are equally imperative as those expressed in writing. * * *
>
> In every case, the duty arises by implication of law out of the relation of master and mariner, or that of owner and seaman. Since these are relations created by contract, the duty itself must be held to arise from a like source; for the incidents of a relation are inseparable from the relation itself."

In *Willey* v. *Alaska Packers' Association,* 9 F. (2d) 937 (affirmed 18 F. (2d) 8) (N. D. Cal.) it was held that the owner's failure to furnish medical attention to a seaman as agreed upon in his contract did not give the seaman's executor a right of action for death "by wrongful act or neglect" as provided by the California Death Act, which applies only to torts; also that the Federal Employers' Liability Act creates a liability in tort and not on contract, and that a tort action does not lie for an omission to perform a contractual duty even if wilful, but there must be some active negligence or misfeasance. The Court said (p. 938):

> "That section, however, by its express terms is applicable only to cases of 'death * * * caused by the wrongful act or neglect of another'; in

other words, to cases of tort and not of contract. Thus construed, it has no possible reference to the instant case, where no positive wrong on the part of respondent has been alleged, and where the only affirmative duty shown to have been omitted was wholly contractual. The fact that this duty, in addition to being within the terms of a written contract, also was imposed by federal statute, in no way changes the situation. As I held in *Cresci* v. *Standard Fisheries Co.* 7 F. (2d) 378, a vessel owner's statutory obligation to furnish maintenance and cure is only one of the incidents which the law affixes to every contract of marine employment, and breach of it creates a liability which in its essence is wholly dependent on contract. The libel, therefore, does not state a cause of action for death 'by wrongful act or neglect', within the meaning of the Code section above referred to."

and on re-hearing (p. 939):

"Section 1 of the federal Employers' Liability Act (Comp. St. Sec. 8657), to which my attention has been directed, creates rights of action for 'death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of (a) carrier, or by reason of any defect or insufficiency, due to its *negligence*. * * *' Here the word 'wrongful' has been left out; but in my opinion its omission produces no different result, for the liability intended to be created, like that under the California Code, is purely one in tort."

"Libelant maintains that under this act the liability for injuries incurred by railroad employees (and seamen) in each case rises out of

a contract of employment, and hence that the contractual origin of the duty said to have been violated here is immaterial. This amounts to saying that as a result of the act the law implies, as a term of the contract of employment, an agreement that the employer's agents, officers, and other representatives will take due care not to injure the employee, and to say the least is artificial. Furthermore, the history of the act, traceable in reported cases, shows that Congress intended to *add* no such legal implication to the contract."

"'The federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. *No new right of action is given;* all that is done is to take away certain defenses which had come to be thought unjust. *The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby.' Rounsaville* v. *Central Ry. Co.* 87 N. J. Law, 371, 94 A. 392."

"Libelant answers this by saying that the instant case actually is one of negligence, and that, because negligence results in tort, a recovery may be allowed. If such be the rule, then every negligent breach of contract must be a tort, for the decedent in this case was injured through the active fault of no one but himself, and the only affirmative duty alleged to have been omitted by respondent, depends entirely upon a contractual obligation.

* * * * * * * *

But one authority has been discovered which is on all fours with the present case. *Galveston, Houston & Southern Railway Co.* v. *Hennegan,*

33 Tex. Civ. App. 314, 76 S. W. 452, 453. There it was held in a carefully reasoned opinion, that where an employer fails to furnish an employee with medical attention, as he has agreed to do, the employee's cause of action is for breach of contract, and not in tort for negligence. Cooley, Pollock, Shearman & Redfield, and Bishop are shown to be as one upon the question. An omission to perform a contract may not be treated as negligence. The case is directly in point and decisive." (Italics ours.)

POINT III.

Failure to furnish cure is a failure to perform a contract obligation as heretofore shown and therefore cannot be negligence under the Jones Act.

Even though it be granted that an act of misfeasance or malfeasance in the performance of a contractual obligation after such performance has been begun constitutes a tort (and this is not always so, for negligent conduct of professional business intrusted to an attorney is a breach of contractual duty, on which the statute of limitations begins to run when the failure of duty occurs, though it may cause no damage until later [see Williston on Contracts, Vol. III, §2037]), yet it is well settled that nonfeasance, being an omission to act even though a duty so to do has been assumed by contract or implied in law, is only a breach of contract and cannot constitute a tort.

Thus, the failure of an employer to furnish medical attendance to an employee, in violation of an agreement

to do this, is a breach of contract, and the employee has no cause of action in tort for negligence. *Galveston, etc., R. R. Co.* v. *Hennegan,* 33 Tex. Civ. App. 314, 76 S. W. 452.

Where a physician who has contracted to treat a person's family for a year refuses to visit a member of the family when sent for, or to undertake the case, the right of action against him is for breach of contract only, and not for tort. *Randolph* v. *Snyder* (Ky., 1910), 129 S. W. 562.

Where plaintiff delivered his horse to defendant, a livery stable keeper, and it was alleged that defendant had neglected to take due and proper care (which was an implied term in the contract), by reason whereof the said horse was kicked by other horses, it was held that there was no cause of action independent of the contract. *Legge* v. *Tucker,* 1 H. & N. 500, 2 Jur. N. S. 1235, 26 L. J. Exch. 71, 5 Weekly Rep. 78.

In *Boorman* v. *Brown,* 3 Q. B. 511, 2 G. & D. 793, 11 L. J. Exch. 437, 43 E. C. L. 843, 114 Eng. Reprint 603, aff'd in 11 Cl. & F. 1, 8 Eng. Reprint 1003, plaintiffs sued a broker, retained by them to sell oil, in an action on the case, alleging that in selling the oil for plaintiffs to a third person defendant had failed to use reasonable diligence and care, and contriving and intending to injure plaintiffs, had delivered the oil to the purchaser without requiring cash payment. It was held that the duty of defendant arose from an express contract, and the action could not be in tort.

As was held in *Schick* v. *Fleischhauer,* 26 App. Div. 210, 49 N. Y. S. 962 (cited in Petitioner's Brief, p. 15),

a tenant cannot recover in tort against his landlord for a personal injury due to the landlord's failure to make repairs as provided by contract, unless there is some other breach of duty than the mere failure to perform the covenant to repair.

A complaint in case, alleging that plaintiffs engaged defendants to prepare the remains of her husband for burial and shipment by a certain train to leave at a specified hour and that when this hour arrived the defendant had made no preparation for the shipment of the remains at this time, was held insufficient in that there was no duty, independent of contract, to perform the obligation, and that no consideration was alleged for any contract. *Newton* v. *Brook*, 134 Ala. 269, 32 So. 722.

On the other hand, in *Taylor* v. *Manchester, etc., R. R. Co.* [1895], 1 Q. B. 134, 59 J. P. 100, 64 L. J. Q. B. 6, 71 L. T. Rep. N. S. 596, 14 Reports 34, 11 T. L. R. 27, 43 Weekly Rep. 120, plaintiff, a passenger on defendant's railroad, was injured by the act of the latter's servant in slamming a door. It was held that "that which caused the injury was not an act of omission, it was not a mere nonfeasance; it was not merely the not taking care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract he could maintain an action for that."

The cases cited in petitioner's brief, Point III granting that they are correctly decided, are all consistent with the principle enunciated above.

The quotation from *Osgoodby* v. *Talmadge,* 45 F. (2d) 696, set out in petitioner's brief, page 13, is ob-

viously dictum. The real holding of the decision is that a promisor is not liable in tort "if he 'maliciously' throws obstacles in the way of the promisee to prevent his performance and 'maliciously' himself fails to perform." The terms of the contract were that defendant agreed to sell to plaintiff certain land for $15,000 payable in installments, that plaintiff should improve the property and resell portions thereof from time to time, and that defendant should deliver deeds to plaintiff's vendees upon receiving the agreed prices for lots so conveyed. The Court said:

> "The other acts complained of, namely, selling the railroad right of way, recording the plat which dedicated streets, and refusing to convey the remainder of the property covered by the contract after payment in full, were, if invasions of plaintiff's rights at all, merely breaches of contract, for which no recovery could be had in an action in tort."

This same case explained and criticized the decision in *Rich* v. *N. Y. C. & H. R. R. Co.*, 87 N. Y. 382, relied upon by petitioner in his brief, page 14. It appears from this explanation that the railroad's violation of a contract with Rich to open a depot on a site adjacent to his property, for the purpose of depressing the value of Rich's property in order to eliminate his opposition to closing a street, was a breach of contract for which no action in tort would lie. The Circuit Court of Appeals added:

> "The *Rich* case can stand for no more than its actual holding, and we need not now consider whether this court would approve the holding, or be bound in any event to follow it."

The decision in *Attleboro Mfg. Co.* v. *Frankfort Marine, etc., Ins. Co.*, 240 Fed. 573 (Petitioner's Brief, pp. 14, 15), was not based upon the negligent performance of a contractual duty. The Court there said (p. 582):

> "As each count sounds in tort, and is based upon a duty imposed by law, it is wholly immaterial whether the defendant was or was not under a contractual duty to prepare and defend the suit or to settle the same."

And at page 579:

> "The claim is that, having actively intervened in the defense of the suit and in the settlement thereof, it was under a duty imposed by law to exercise due care not to injure the plaintiff's rights in what it did, and we so hold."

The Western States, 151 Fed. 929, aff'd. 159 Fed. 354 (Petitioner's Brief, p. 15). In this case it does not appear whether the action was in contract or in tort, and it was unnecessary to decide the question. From the language of the District Court it may be inferred that the ground of the liability was breach of contract.

Schick v. *Fleischhauer*, 26 App. Div. 210, 49 N. Y. S. 962 (Petitioner's Brief, p. 15), as pointed out above, supports the respondent's contention.

The same is to be said of *Franklin Fire Ins. Co.* v. *Weinberg*, 110 Misc. 644, 181 N. Y. S. 15 (Petitioner's Brief, p. 15).

Kennedy v. *F. W. Woolworth Co.*, 205 App. Div. 648, 200 N. Y. S. 121 (Petitioner's Brief, p. 15), must be re-

garded as an erroneous decision and in conflict with the rule of *Chysky* v. *Drake Brothers Co.*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533, holding that the manufacturer or seller of food or other articles of personal property is not liable under an implied warranty to third persons who have no contractual relations with him.

In *Montreal* v. *De Montigny*, 11 Que. Pr. 273, 275, it was held that "personal wrong" does not include wrongs or injuries arising from contract.

POINT IV.

The proofs utterly fail to show that the death of Santiago was caused by the breach of any of defendant's obligations.

The Circuit Court of Appeals expressly withheld judgment as to whether causation had been proved and assumed it only for the purpose of argument. The complaint charged cold and unsanitary quarters and insufficient bedding, failure to furnish proper and sufficient food and failure to keep Santiago in the hospital room aft; also failure to obtain aid from passing vessels and failure to obtain medical assistance earlier.

Charge of cold quarters:

This vessel sailed from the tropics in October and the temperature on the voyage averaged about 80° Fahrenheit until the day before arrival off Staten Island, when it ranged between 60 and 78. The expert testimony showed that pneumonia patients need all the fresh air

possible, with windows down from the top, even in severe cold weather and damp rainy weather (R. 89, 174). There was no request by anybody for heat in the forecastle and none was needed (R. 155, 136, 196, 200, 204).

Charge of unsanitary forecastle:

Much ado was made about the presence of some salt water on the floor. The uncontradicted testimony showed that that would have no effect upon the course of Santiago's disease (R. 170). Santiago insisted upon keeping his clothing on and had ample bedding (R. 191, 175). There was absolutely no testimony that the bedding had any effect on the disease.

Failure to keep Santiago in the hospital room:

This room was intended for contagious diseases and Santiago was kept in the forecastle so that the men there could give him better treatment than if he were alone in the after part of the ship. No attempt was made to show that this had anything to do with Santiago's death (R. 174, 125).

Failure to furnish proper food:

Santiago received soup or broth and orange juice which is almost the exact diet prescribed by plaintiff's doctor, Kienzle (R. 82, 120, 153, 158, 196, 200).

Failure to obtain aid from passing vessels or more prompt medical assistance after arrival off Staten Island:

After leaving Point Jupiter in Florida the vessel then put out to sea following the Gulf Stream (R. 161).

Santiago had then been ill only about 24 hours and the ship's officers thought he was suffering from a grippe cold. There was no evidence of passing other vessels after leaving Point Jupiter. The evidence does not show that it would have been better to transfer Santiago to another vessel. Upon arrival at New York Harbor the master and officers never appreciated that Santiago was suffering from pneumonia, especially when the man became ill off Florida with the thermometer at about 80°. Plaintiff's own doctor stated that the symptoms described might indicate a number of other ills, not particularly pneumonia even to a doctor. Santiago's temperature became lower on arrival off Staten Island. Both the master and third officer, Jounse, saw Santiago on deck on October 21st and thought he was getting better (R. 123, 153). Plaintiff's doctor, Kienzle, only gave him a "chance of 88 out of 100 of surviving" (R. 100) and that meant with modern hospital treatment, use of serum, special diet, alcohol baths and based upon the patient entering the hospital within 24 hours after he first became ill (R. 101). Moreover Dr. Kienzle's testimony fairly establishes that the type of pneumonia in this case was the Friedlander bacillus type (R. 68). Dr. Kienzle, however, had not much experience, apparently, with pneumonia and did not know that serum is never given in the Friedlander type, as was amply shown by the testimony of Dr. Baldwin, a pneumonia specialist at the New York Hospital (R. 164, 165, 185). Moreover, Dr. Baldwin and Dr. Cornell testified that mortality in the Friedlander type runs from 70 to 90% and is usually fatal so that Santiago was doomed by the nature of his illness rather than by any failure to receive medical treatment (R. 182).

The District court was therefore in error in per-

mitting the jury to speculate as to whether his death was caused by the infection or by the lack of hospital treatment.

Ford v. *McAdoo*, 231 N. Y. 155;
White v. *Lehigh Valley R. R. Co.*, 220 N. Y. 131.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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H. VICTOR CRAWFORD,
Of Counsel.

Dated, March 17, 1932.

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CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 12.

RAFAEL CORTES, as Administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF FOR THE RESPONDENT.

GEO. WHITEFIELD BETTS, JR.,
Counsel for Respondent,
120 Broadway,
New York City.

H. VICTOR CRAWFORD,
Of Counsel.

THE COURT PRESS, INC.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 12.

RAFAEL CORTES, as Administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 237) is reported in 52 Fed. (2d) 22.

Questions Presented.

The primary question presented is whether a cause of action arises under Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. §688) (hereinafter called the Jones Act) for the death of a seaman resulting from an alleged failure of the defendant shipowner to provide proper medical treatment for an illness contracted by the seaman without fault attributable to the vessel. This question was answered in the negative by the Circuit Court of Appeals for the Second Circuit, and, as a result, that court did not decide but merely assumed, for the purposes of the argument, that the seaman's death was caused or contributed to by the alleged failure to provide treatment.

If this Court answers the statutory question in the affirmative, it should then pass upon the questions of causation, and the allowance of interest from the date of death.

Pleadings.

The complaint is in tort. It contains the usual averments of the appointment and qualification of the plaintiff (petitioner) as administrator, the incorporation of the defendant, the ownership and operation of the S. S. *Delisle* and the employment of plaintiff's intestate as a seaman by the defendant.

It further alleges that the plaintiff's intestate, Santiago, became dangerously ill in Boca Grande, Florida, prior to the *Delisle's* sailing from Boca Grande, Florida, to New York (October 16, 1928); that the officers of the ship failed to give him any medical attention and failed to obtain assistance from passing vessels; that the said officers failed to place Santiago in the hospital room and kept him in the forecastle; that these quarters were dangerously cold and unsanitary and there was insufficient bedding; that no steps were taken for Santiago's relief when the vessel reached Sandy Hook and that he was not removed to a hospital until the afternoon of the following day; that one day later Santiago died.

It charges that the death of Santiago was caused "solely by reason of the negligence of the defendant as aforesaid" (R. 3) and claims Fifty thousand ($50,000) Dollars damages.

The amended answer admits the allegations of ownership of the vessel and employment of Santiago. It denies that he became ill in port and alleges that he became ill at sea after the voyage started. The charges of negligence contained in the complaint are denied.

As a separate defense the amended answer charges

contributory negligence on the part of Santiago in failing to take medicines, to keep his bed-clothes on, to stay in bed and in refusing to obey other instructions of the officers.

Facts.

The *Delisle* sailed from Boca Grande, Florida, on the evening of October 16th, 1928, bound for Carteret, New Jersey. Plaintiff's witnesses disagree as to the time when Santiago first became ill but it is fairly clear from all the testimony that he felt ill during the night after sailing and that the officers were first notified the following morning, October 17th, when the deceased about 8 A. M. reported on deck to the mate that he felt sick, and was sent to bed in the forecastle and given quinine and salts and a light diet with broth. The mate diagnosed his trouble as a little tropical fever, reported to the Captain who thought he was a little grippey and prescribed a purgative and some quinine, and ordered him on a diet, and after he found his temperature was hanging up, ordered orange juice and lemonade in the morning, and broth at noon and evening (R. 81, 88, 97, 108, 109).

On the second morning out the Captain, who had lost a leg previously in saving a seaman's life from a tackle about to break in a storm (R. 98, 99) instructed the third officer who had had first aid training in the Navy, to go to the forecastle to take Santiago's temperature and see what in his opinion was the matter with him. He confirmed the Captain and diagnosed his trouble as a bad cold which might turn into grippe and reported that that was all that was the matter with him. He and the Captain then decided that the physic and quinine was the proper treatment and the third mate went forward to see him twice and sometimes three times a day to see that he took his medicine, consisting of quinine and cathartic pills as he refused to take salts. The third mate and the Captain de-

cided that his fever was not high enough to worry about and that the quinine would probably reduce it, and that special broths should be given him every day by the steward (R. 123, 124, 125). The steward, Fielding, also went to see Santiago on the 17th, the day after sailing, under the orders of the Captain, and prepared a special diet of soups for him which was fed to him daily. The steward attended him daily, giving him his medicine (R. 156, 157, 158). He was also fed orange juice in the morning, at other times tea, and on Sunday soft boiled eggs (R. 160, 161, 164).

The chief mate went into the sailors' quarters where Santiago was two or three times a day and had no suspicion that the man was dangerously ill (R. 111). The third officer and the steward reported daily to the Captain on the man's condition (R. 101).

On the 20th one of the sailors reported to the chief mate, Callis, that Santiago was up and around the forecastle and smoking a cigarette.

On the 21st, the day before the ship arrived at Cartaret, Cullison, the master, saw Santiago sitting on the hatch on deck and thought the man was recovering (R. 99, 103).

The third mate, Kounse, also saw Santiago up on deck on October 21st and saw him walk the full length of the well deck firmly. He did not seem in a condition to work but otherwise all right (R. 125).

His temperature was taken each day, written in the ship's log and was stipulated in the record to have been as follows (R. 7, 8):

Oct. 17	5:45 P. M.	104	degrees
" 17	midnight	102	"
" 18	7 A. M.	104	"
" 19	7 A. M.	103	"
" 20	7 A. M.	103	"
" 21	7 A. M.	103	"
" 22	8:30 A. M.	103	"

Santiago was permitted to remain in the forecastle. The master testified that the hospital room was in the stern away from everybody and that he did not think it necessary to put Santiago there as he saw nothing contagious about his illness and he would get better care forward (R. 101).

The weather on the voyage north was fine (R. 96). The temperatures as taken on the bridge and shown in the ship's log were offered in evidence (Defendant's Exhibit B (R. 177, 178).

The thermometer never went below 70° until the afternoon of October 20th, and averaged about 80° during that time. From noon on October 20th until the vessel arrived in New York Harbor on the evening of October 21st the thermometer varied from a low of 60° to a high of 78°.

The steamer arrived at her anchorage at the mouth of the Raritan River on October 21st at about 6:35 P. M. (R. 112). She lay all night at anchor and proceeded to her dock at Cartaret the following morning. An ambulance was summoned from the Staten Island Marine Hospital in the afternoon and arrived 4:20 P. M. (R. 60). On arrival at the hospital Santiago was in a very serious condition (R. 54), and he died the following morning. His case was diagnosed as lobar pneumonia, with consolidation on both sides.

POINT I.

Plaintiff's case, involving only an alleged breach of the shipowner's contractual obligation to furnish medical treatment, does not fall within the provisions of the Jones Act.

This action was brought at common law and the complaint charges negligence. Although not specifically pleaded, the suit will be deemed to have been founded on Section 33 of the Merchant Marine Act of 1920, referred

to herein as the *Jones Act,* which amended Section 20 of the Seamen's Act of 1915. This Court in the case of *Engel* v. *Davenport* (271 U. S. 33) decided that where such a suit is brought at law and the complaint (containing no reference to the *Jones Act*) charges negligence, the suit is to be regarded as founded on that Act. Plaintiff, indeed, on the argument to dismiss, stated in open court that the suit was brought under the *Jones Act* (R. 92).

At common law and under the general maritime law no civil action lies to recover for death caused by negligence.

> *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240;
> *The Albert Dumois,* 177 U. S. 240;
> *The Harrisburg,* 119 U. S. 199;
> *Lindgren* v. *United States,* 281 U. S. 38.

The *Jones Act,* however, has modified our maritime law so as to permit a recovery for the death of a seaman as a result of a *personal injury* received in the course of his employment through the negligence of fellow servants. The Act, Section 33 (U. S. C. A. Title 46, Section 688), reads as follows:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

> Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The question is can the Act be construed to apply to a case involving no "personal injury" whatsoever, but merely an alleged failure to take proper care of a seaman who had fallen ill without any fault on the part of the ship.

The Circuit Court of Appeals thought that if a failure to treat the illness aggravated the disease, the aggravated condition would be a personal injury assuming that the statute should be interpreted to cover such a case, saying (R. 190):

> "Analogies may be found in decisions under compensation statutes where acceleration of a pre-existing disease resulting in death is held to come within the term 'injury';"

citing *In re Brightman,* 220 Mass. 17; *Pace* v. *N. D. Workmen's Comp. Bureau,* 201 N. W. 348, 51 N. D. 815. When these cases are examined they do not sustain the analogy drawn.

In the *Brightman* case, a member of the crew of a lighter which was sunk in the harbor made several trips to and from the deck to save various articles and the exertion and excitement caused his death from heart disease from which he had suffered before. In this case it was held there was an injury arising out of and in the course of his employment.

In the *Pace* case, the workman died from apoplexy caused by working in a heated boiler. It was held that the rupture of the blood vessel which caused his death was the result of duties performed in the course of his employment.

Such decisions in compensation cases are hardly authority on the question of what is a personal injury in a case like that at bar where the seaman was suffering from a virulent germ disease in no way arising out of his em-

ployment and no doubt having had its inception before the beginning of the voyage.

The outstanding feature of the Act is the provision giving a remedy for the negligence of the master or a fellow servant in personal injury cases. This had been ineffectually attempted in Section 20 of the Seamen's Act of 1915 (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372).

It is significant that there is no reported case (as far as counsel can ascertain) in which a recovery under the *Jones Act* has been allowed in a case involving illness as distinct from injury.

The reference to the statutes applicable to railway employees is to the Employers' Liability Act of April 22, 1908 (Chapter 149, 35 Stat. 65, U. S. C. A. Title 45, Section 51). Section 1 of that Act (the part pertinent to the present argument) reads as follows:

> "LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE. Every common carrier by railroad while engaged in (interstate) commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65)."

It has never been contended so far as we know that this Act applied to cases involving the illness of railway employees and no reported case has been found by counsel

even asserting such contention. No duty existed at common law requiring a railroad employer to care for employees becoming ill in the course of their work. The Act did not change the common law in this respect. As stated by this Court in the recent case of *Jamison* v. *Encarnacion*, 281 U. S. 635, 639:

> "The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault or negligence of fellow servants and applies the principle of *respondeat superior.*"

Inasmuch as the *Jones Act* merely affords to seamen such rights as railway employees had by Federal statutes it seems clear that there was no intention on the part of Congress to create any action for death which in its nature could not have been brought by a railway employee under the *Employers' Liability Act.*

Had Congress intended to provide in the *Jones Act* a death statute comprehensive enough to cover all cases whether arising out of tort or contract, it would have been a simple matter to use the broad language contained in *"An act relating to the maintenance of actions for death on the high seas"* (Mar. 30, 1920, c. 111, §1, 41 Stat. 537). In this Act, passed less than three months before the *Jones Act,* the language used is

> "Whenever the death of a person shall be caused by wrongful act, neglect *or default* occurring on the high seas * * * the personal representative of the decedent may maintain a suit for damages * * * against the vessel, person or corporation which would have been liable if death had not ensued." (Italics ours.)

The words "or default" could be properly construed to

cover liability for failure to comply with a contractual duty to provide medical treatment. It is certainly significant on the question of the intent of Congress, that the *Jones Act,* dealing with a closely related subject, does not include the comprehensive language of the "Death on the high seas" Act.

The *Jones Act* has been construed many times by this Court and the language used consistently shows that the Act is limited in its scope to what are commonly called *personal injuries* resulting from negligence on the part of the ship, its owners, officers or seamen.

The first case construing this Act was *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375. This Court stated in its opinion:

> "The statute is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment. Without question this is a matter which falls within the recognized sphere of the Maritime Law and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in non-maritime service * * *.
>
> Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so."

One of the most recent cases in this Court is that of *Lindgren, Admr.* v. *The United States,* 281 U. S. 38. After citing the Act, the Court stated (pp. 40, 43):

> "By this act, as heretofore construed by this court, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Federal Employers' Liability Act and its amendments, and permitting *these new and substantive*

rights to be asserted and enforced in actions *in personam* against the employers in Federal and State courts administering common law remedies, or, in suits in Admiralty, in courts administering maritime remedies.

* * * * * * * * *

1. Prior to the adoption of the Merchant Marine Act the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. See *Harrisburg,* 119 U. S. 199; *Osceola,* 189 U. S. 158, 175; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240.

* * * * * * * * *

By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted *from personal injuries* the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act." (Italics ours.)

* * * * * * * * *

And at page 47:

"The statement in *The Osceola, supra,* 175, on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words 'at his election'—which appear in the first clause of Sec. 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman, and, as held in *Pacific Co.* v. *Peterson, supra,* 139, gave him, as alternative measures of relief, 'an election between the right under the new rule to recover compensatory damages for injuries caused by negligence, and the right

> under the old rules to recover indemnity for injuries occasioned by unseaworthiness'—were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And, for the reasons already stated, and in the absence of any right of election, the right of action given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received."

In *Pacific Steamship Co.* v. *Peterson,* 278 U. S. 130, this Court decided that the election given to seamen by the *Jones Act* is between an action to recover compensatory damages under the new rule for injuries caused by negligence and a suit to recover indemnity under the old rules for injuries occasioned by unseaworthiness, saying (pp. 136, 137, 138):

> "Plainly, we think, the right under the new rule to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages—which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship, and grows out of that which was termed in *Montezuma* (C. C. A.), 1927 A. M. C. 1423, 19 F. (2d) 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel. * * * In short, the right to maintenance, cure and wages, *implied in*

law as a contractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative.

The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, *both grounded on tort*, that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. But, whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, *West Cape, Baltimore S. S. Co.* v. *Phillips, supra*, 321, for which he is entitled to but one indemnity by way of compensatory damages.

Consider in the light of these several remedies and the extent of the inconsistency between them, we agree with the view expressed by the Supreme Court of Washington *that the statute was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages—to which it made no reference.* And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; and *that no election is required between the right to recover compensatory*

> *damages for a tortious injury under the new rule, and the contractual right to maintenance, cure and wages* under the old rules—the latter being a cumulative right in no sense inconsistent with or an alternative of, the right to recover compensatory damages." (Italics ours.)

It seems clear from the foregoing that this Court considered that it was not the intention of Congress in the *Jones Act* to interfere with the long-established rules of "maintenance and cure" for seamen in cases of illness or accident.

Congress had long been considering measures for the relief of American seamen (Seamen's Act, 1915) and was reasonably familiar with the law in respect to maintenance and cure—a relationship peculiar to the seaman's contract. In drafting the *Jones Act* it would have been a simple matter to have added the words "or illness" to make the law read:

> "That any seaman who shall suffer personal injury or illness in the course of his employment * * *; and in case of the death of any seaman as a result of any such personal injury or illness * * *."

The omission of the word "illness" from the statute was not accidental—Congress intended only that seamen should be placed in as favorable a position as railway employees in the matter of "personal injuries".

Reports of hearings of the committee of the Senate on the Merchant Marine Act indicate that there was no intent to change the maritime law except in cases of personal injury or death arising out of *accident* aboard ship.

The amendment of 1920 (Section 33) was proposed by the Senate to the original House of Representatives bill (H. R. 10378) and was adopted with no material changes. The language was proposed by Mr. Furuseth himself who

was attending hearings before the Senate Committee in his capacity as President of the International Seamen's Union of North America. The following is an excerpt from the report of the hearing held on February 27, 1920 (Commerce Committee Hearings, 66th Congress, p. 1712):

> "The Chairman (Senator Jones): 'What is the amendment you suggest to Section 20 (of the Seamen's Act of 1915)'
>
> Mr. Furuseth: 'That any seaman who shall suffer personal injury in the course of his employment, may at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.'
>
> Senator Fletcher: 'In other words under the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy.'
>
> Mr. Furuseth: 'He would have no remedy.'
>
> Senator Fletcher: 'And now you want to change that so he would have a remedy provided that his own negligence did not bring about the injury.'
>
> Mr. Furuseth: 'That is it exactly'."

The report of the Managers for the House of Representatives in commenting on the Senate's amendment (No. 139) states:

> "This amendment amends Section 20 of the Sea-

men's Act so as to extend the Federal Employers' Liability Act to cases of personal injury *to or death of* seamen" (Cong. Record, Vol. 59, part 8, p. 8409, 66th Cong., 2nd Session, June 3, 1920).

The scope of relief under the *Jones Act* is obviously limited by its terms to cases defined in the *Employers' Liability Act.* This Court has recognized this limitation in a very recent decision, *Jamison* v. *Encarnacion,* 281 U. S. 635. The facts involved the question of whether a longshoreman, assaulted by his gang boss in the supposed course of his duties, could recover under the *Jones Act.* The Court stated in its opinion:

> "He is entitled to recover if within the meaning of Section 1 (of the Employers' Liability Act) his injuries resulted from the negligence of the foreman. The question is whether 'negligence' as there used, includes the assau' in question."

Applying the same test to the case at bar, it is clear that no recovery under the Act should have been allowed. It is idle to contend that the Act for the benefit of railway employees intended to embrace in the use of the term negligence a breach of a duty which never existed at common law but only under the old maritime rules.

It seems to counsel that the answer to petitioner's attempt to bring this case within the scope of the *Jones Act* is the same as was given by this Court in the case of *Chelentis* v. *Luckenbach Steamship Company,* 247 U. S. 372. In that case, the petitioner's contention was that Section 20 of the Seamen's Act of 1915 declaring "seamen having command shall not be held to be fellow servants with those under their authority" imposed a new and different obligation upon shipowners. This statute was held ineffective, the Court, speaking of the liability for maintenance and cure, stating (p. 384),

> "but the Maritime law imposes upon a shipowner

liability to a member of the crew injured at sea by reason of another member's negligence, without regard to their relationship; it was of no consequence, therefore, to petitioner whether or not the alleged negligent order came from a fellow servant: the statute is irrelevant."

The liability referred to is the only liability upon which the present action can be based. The Seamen's Act as amended by the *Jones Act* has been held to have changed the Maritime law by giving a new cause of action to seamen injured by negligence, in which the defense of negligence of a master, officer or fellow servant is eliminated and the contributory negligence rule changed to the Maritime rule of comparative negligence; but, in the contractual Maritime action for failure to provide cure, these defenses were never available to the shipowner. The duty was non-delegable as is the duty to provide a seaworthy vessel. The negligence of a master or a mate never constituted a defense to the shipowner in such an action. It was irrelevant. The fellow servant rule has always been limited to the negligence of fellow servants engaged in the same work as the injured man. This rule could hardly apply in the case of negligence in affording medical treatment in cases of illness or injury.

In *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642 (1886), the action was brought to recover for damages suffered by a railroad employee injured by reason of defective machinery. Dismissal of the suit was urged on the ground that the plaintiff was a fellow servant of the Agent of the Company in charge of keeping the cars in order. This Court stated in its opinion (pp. 647, 648):

> "The general doctrine as to the exemption of an employer from liability for injuries to a servant caused by the negligence of a fellow servant, in a common employment, is well settled. * * *
>
> It is equally well settled, however, that it is the

duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question."

In the *Iroquois*, 194 U. S. 240, 241, this Court said per Brown, *J.*:

"This was a libel filed in the District Court for the Northern District of California by Matthew Bridges against the ship *Iroquois*, to recover damages for a failure of the master to provide suitable surgical treatment and care for the libellant, who had suffered injury by a fall from the mainyard to the deck of the vessel."

* * * * * * * * *

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all Maritime nations. It appears in the earliest codes of Continental Europe and was expressly recognized by this Court in the recent case of the *Osceola*, 189 U. S. 158."

The decision in this case was not "that it was negligence not to divert the ship", as asserted in petitioner's brief (p. 35), but on the contrary that the ship was responsible in damages for the master's failure to discharge the duty imposed as a part of the contract. The opinion does not specifically declare that the lien allowed against the *Iroquois* arose out of the breach of the contract of employment, but the reference to the *Osceola* and the opening statement of fact clearly imply that the decision was under the rules therein enumerated, including the following (p. 175):

> "That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

It seems obvious that the recovery allowed in the *Iroquois* was on the theory of contract, and that under the Maritime law any recovery on the theory of negligence was impossible.

It follows that, in all actions brought prior to the passage of the *Jones Act* in 1920 involving maintenance and cure or the failure to provide the same, the courts were granting recoveries on a contract and not a tort theory.

In *Harden* v. *Gordon*, 2 Mason 541, decided in 1823, Story, *J.*, a Judge of great experience in maritime law, had before him a libel which included a claim for the expenses occasioned by the sickness of a seaman in a foreign port. Speaking of the right of the seaman to be healed at the expense of the ship he said (p. 543):

> "It constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen."

And at pages 545, 546:

"In the *Madonna D'Idra* (1 Dodson 37), where a claim was made on behalf of Greek sailors for subsistence after their discharge from the ship, as well as for antecedent wages, the court did not hesitate to decree it. 'It is,' said the learned Judge on that occasion, 'wages paid in another form, it is part of the compensation for their labour; and according to the law of the country, to which these men belong, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages.' In what respect does subsistence in case of a discharge differ from additional subsistence in case of sickness? To use the language of the court, it is but 'wages in another form,' additional wages to meet additional expenses, and constituting, if the maritime law and usage uphold the claim, a part of the contract."

And at page 547:

"But I do not mean to dwell further on this point. My opinion is, that if the plaintiff is entitled to be cured at the expense of the ship, it is a claim in the nature of additional wages during the period of sickness, and is just as proper for a suit of this sort, as a claim for additional pay, while in port, or for subsistence in port, where that has been unjustly withheld. It stands upon the same analogy, as the compensation allowed by our laws in cases of short allowance of provisions and water, where it is expressly provided, that the amount shall be recoverable in the same manner as wages. It is a part of the maritime hire and reward, constituting an essential term in the contract, and no more objectionable in point of jurisdiction than a claim for any other allowance in the ordinary course of trade, or any specific stipulation for an increase of com-

pensation in extraordinary exigencies. The question of jurisdiction may then be dismissed."

In *Reed* v. *Canfield*, 1 Sumner 195, Story, *J.*, in the Circuit Court affirmed a decree awarding the expense of cure to a seaman for more than a year after he left the ship and said (pp. 202, 203):

> "The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party, while in the ship's service; and he is not to receive any compensation, or allowance for the effects of the injury. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages."

The above two cases contain an interesting discussion of the history of the law of maintenance and cure.

Various decisions specifically confirm the view that in this class of case no change in the Maritime law of maintenance and cure was effected by the *Jones Act*.

> *Pacific Steamship Co.* v. *Peterson, supra;*
> *Lindgren Admr.* v. *The United States, supra;*
> *Persson* v. *Gulf Refining Co.*, 228 App. Div. 366;
> *Morris* v. *United States*, 3 F. (2d) 588;
> *Willey* v. *Alaska Packers Ass'n*, 9 F. (2d) 937;
> *Cresci* v. *Standard Fisheries*, 7 F. (2d) 378;
> *The Hanna Nielson*, 273 F. 171.

In the case of *Persson* v. *Gulf Refining Company*, 228 App. Div. (N. Y.) 366, a suit was brought by a seaman for indemnity based on two causes of action—the first, negligence in causing plaintiff's injuries, second in failing to provide him with cure for the said injuries. Both Trial Court and the Appellate Division regarded the first cause of action as being under the *Jones Act* and the second based wholly on the old maritime law. On the appeal the defendants assigned error in that the Trial Court did not compel plaintiff to elect. Plaintiff admitted that the second cause of action was under the old rules but claimed that such action was not an alternative of the action under the *Jones Act* for causing the injury. It was argued that the second cause of action arose independently of any negligence in causing the injury, and that therefore no election was required between the two consistent and concurrent causes of action alleged.

The Appellate Division stated in its opinion, page 366:

> "No negligence on the part of the defendant was established in this record, so far as it related to the first cause of action, which was assumed to be one under the Jones Act (Merchant Marine Act of 1920 (41 U. S. Stat. at Large, 1007), Section 33; now U. S. Code, tit. 46, Section 688), and which was made the subject of question No. 1 in the special verdict of the jury. Testimony, however, was adduced, credited by the jury, which established defendant's liability under the second cause of action, which should be construed as an action for compensatory damages for breach of the defendant's duty to furnish to the plaintiff, with reasonable promptness, cure for injuries received aboard ship. The jury could probably hold that this duty was breached and that this plaintiff should have been given medical treatment at the available marine hospitals in the ports that the vessel passed *en route*

> to Port Arthur, Texas. The allegations in the second cause of action, so far as they might be construed to allege a cause of action other than that just stated, should be disregarded as surplusage. On such a view, the complaint may not be deemed to contain inconsistent causes of action between which an election by the plaintiff might properly be required on the motion of the defendant."

This case is a clear indication that neither courts nor counsel considered the cause of action founded on the breach of duty to provide a cure to the injured seaman to be based upon the *Jones Act,* or to have any connection therewith.

The substantial charges in this case are based upon the alleged non-performance on the part of the defendant of its duty to land plaintiff at some port on the voyage north, to furnish medical treatment or to take him to the hospital sooner than he was taken. Such charges are of necessity based only on the theory that a contractual duty owed by the defendant to the plaintiff has not been performed. The fact that failure to provide medical treatment is a breach of a contractual duty rather than a tort is clearly indicated in the opinion in the case of *Morris* v. *United States,* 3 Fed. (2d) 588, 591 (C. C. A. 2nd Circ.). In that case the plaintiff, a seaman, suffered a hernia on the voyage from Southampton to New York City. No medical attendance was given to him and he was not put ashore at an intermediate port in the Azores where the vessel made a stop. Although there were various causes of action alleged the only one considered valid by the Court was that based upon failure to provide medical attention. The Court stated in its opinion by Manton, *C. J.* (p. 591):

> "Indeed, it was the duty of the captain of the vessel to obtain medical aid at the intermediate port of the Azores for the injured seaman if he had no

> means of affording medical attention on board. * * * Even though the captain was mistaken, and committed an error of judgment in believing that the appellant was shamming, this fact does not relieve the ship from the responsibility it owed to the seaman. *Unica* v. *U. S. supra.* The consequential damage due to the failure to afford medical aid and maintenance is a measure of damages which is to be awarded. Recoveries have been permitted for neglect to furnish the proper medical care and treatment in actions instituted for consequential damages. * * * The right of recovery for maintenance and cure does not allow recovery for pain and suffering or compensation for injury due to physical incapacity. * * * A right of action for damage for maltreatment is not pleaded here."

It is clear that the Court considered the cause of action one founded on contract rather than in tort for in a tort action obviously recovery for pain and suffering would have been allowed. The cause of action arose subsequent to the *Jones Act* and the libel was *in personam.* The Court could therefore have applied the *Jones Act* had it considered the cause of action as one founded in tort.

Another case, involving a similar cause of action, against a shipowner is that of *Willey* v. *Alaska Packers' Association,* 9 Fed. (2d) 937, (aff'd 18 Fed. (2d) 8), Northern District of California, in which it was held that the vessel owner's failure to furnish medical attention to a seaman as agreed did not give the seaman's executor a cause of action for death "by wrongful act or neglect" within the California death act which applies only to torts; also that the Federal Employers' Liability Act, giving a cause of action for death resulting from carrier's negligence creates a liability based on tort and not on contract, and that a tort action does not lie for an omission to perform a con-

tractual duty even if wilful, but there must be some active negligence or misfeasance. The Court said (p. 938):

> "Section 377, Code Civ. Proc. Cal. it is argued, does not merely enable an administrator or executor to enforce claims for personal injuries to his decedent, as is done by some statutes, but creates new and entirely independent rights, to which he does not *succeed*, but which on behalf of other persons he is empowered to enforce.
>
> That section, however, by its express terms is applicable only to cases of 'death * * * caused by the wrongful act or neglect of another'; in other words, to cases of tort and not of contract. Thus construed, it has no possible reference to the instant case, where no positive wrong on the part of respondent has been alleged, and where the only affirmative duty shown to have been omitted was wholly contractual. The fact that this duty, in addition to being within the terms of a written contract, also was imposed by federal statute, in no way changes the situation. As I held in *Cresci* v. *Standard Fisheries Co.* 7 F. (2d) 378, a vessel owner's statutory obligation to furnish maintenance and cure is only one of the incidents which the law affixes to every contract of marine employment, and breach of it creates a liability which in its essence is wholly dependent on contract. The libel, therefore, does not state a cause of action for death 'by wrongful act or neglect,' within the meaning of the Code section above referred to."

and on re-hearing (p. 939):

> "Section 1 of the federal Employers' Liability Act (Comp. St. Sec. 8657), to which my attention has been directed, creates rights of action for 'death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of (a) carrier, or by reason of any defect or insufficiency, due

to its *negligence.* * * *' Here the word 'wrongful' has been left out; but in my opinion its omission produces no different result, for the liability intended to be created, like that under the California Code, is purely one in tort.

Libelant maintains that under this act the liability for injuries incurred by railroad employees (and seamen) in each case rises out of a contract of employment, and hence that the contractual origin of the duty said to have been violated here is immaterial. This amounts to saying that as a result of the act the law implies, as a term of the contract of employment, an agreement that the employer's agents, officers, and other representatives will take due care not to injure the employee, and to say the least is artificial. Furthermore, the history of the act, traceable in reported cases, shows that Congress intended to *add* no such legal implication to the contract.

'The federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. *No new right of action is given;* all that is done is to take away certain defenses which had come to be thought unjust. *The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby.' Rounsaville* v. *Central Ry. Co.* 87 N. J. Law, 371, 94 A. 392.

Libelant answers this by saying that the instant case actually is one of negligence, and that, because negligence results in tort, a recovery may be allowed. If such be the rule, then every negligent breach of contract must be a tort, for the decedent in this case was injured through the active fault of no one but himself, and the only affirmative duty alleged to have been omitted by respondent, depends entirely upon a contractual obligation.

* * * * * * * * *

But one authority has been discovered which is on all fours with the present case. *Galveston, Houston & Southern Railway Co.* v. *Hennegan,* 33 Tex. Civ. App. 314, 76 S. W., 452, 453. There it was held in a carefully reasoned opinion, that where an employer fails to furnish an employee with medical attention, as he has agreed to do, the employee's cause of action is for breach of contract, and not in tort for negligence. Cooley, Pollock, Shearman & Redfield, and Bishop are shown to be as one upon the question. An omission to perform a contract may not be treated as negligence. The case is directly in point and decisive."

In *The Hanna Nielsen,* 273 Fed. 171, *supra* (C. C. A., 2d Circ., opinion by Hough, *J.*), a libel was filed by a seaman on a Norwegian vessel for injuries and/or cure and maintenance. The District Court dismissed the claim for injuries but allowed cure and maintenance. The Circuit Court of Appeals directed the dismissal of the libel *in toto* on the ground that the right to cure and maintenance was contractual and therefore governed by the Norwegian law, with which it had been proved the ship complied.

In *Cresci* v. *Standard Fisheries et al.,* 7 Fed. (2d) 378, *supra* (N. D. Cal.), Kerrigan, *J.,* held that a seaman's libel for wages, maintenance and cure was based on contract and therefore was not barred by the statute of limitations of California, Section 340, subdivision 3, prescribing one year limitation for tort actions such as actions for injury to or for the death of one caused by wrongful act or neglect, saying (pp. 378, 379):

"The latter (actions for maintenance and cure) are, as stated, in reality actions for breach of contract. Although the articles may be wholly silent upon such points, law and reason imply certain

obligations on the part of the master and owner to the mariner, which are equally imperative as those expressed in writing. * * *

In every case, the duty arises by implication of law out of the relation of master and mariner, or that of owner and seaman. Since these are relations created by contract, the duty itself must be held to arise from a like source; for the incidents of a relation are inseparable from the relation itself."

In *Hughes* v. *Alaska S. S. Co.*, 287 F. 427, 428, 429 (W. D. Wash.), the Court, in speaking of the language of the Jones Act, Section 3, said:

> "The use of the expression 'at his election' shows that the remedy granted by section 33 for a tort is an alternative one to that already possessed by the seaman for his injury—the remedy of care and maintenance and wages to the end of the voyage, where he is injured in the service of the ship, and for full indemnity in case the ship was unseaworthy."

We submit that in determining whether the facts in the case at bar show an action based on tort or on contract this Court should consider primarily the decisions involving the application of maritime law. It is obvious that the maintenance and cure doctrine of the sea can never be wholly covered by the *Jones Act* or any other law predicated upon negligence. Many instances arise where sailors are given prompt hospitalization and thereafter recover for additional maintenance. These cases may only be brought on the theory of contract. Should the Courts allow recovery on any other theory because some employee of the responsible shipowner can be charged with personal negligence which may enlarge but does not alter the contractual duty of the shipowner? We urge that without indication of clear intention on the part of Congress (wholly lacking here) this

Court should not assume any purpose to change this fundamental maritime law or to encroach upon it by permitting in special cases recoveries involving this substantive right upon another theory of liability.

The cases, including these cited by petitioner, do not establish any common law rule permitting an election to sue upon a tort or contract theory in actions involving a failure to perform a contractual duty.

Discussion of Cases Relied on By Petitioner.

In *Meador* v. *Lake Shore & Mich. S. Ry. Co.*, 138 Ind. 290 (Pet. Brief, p. 12), the Court held that no case was made out for the jury as the plaintiff assumed the risk of the injury and therefore the quotations from the opinion found on page 13 of petitioner's brief would appear to be dicta.

Crawford v. *Davis, Director General*, 136 S. C. 95 (Pet. Brief, p. 26), does not really bear on the issues at bar. In that case Davis was held liable because his agent carelessly sent the plaintiff to an incompetent physician who treated him carelessly. It was expressly held by the Court that there would have been no liability if due care had been taken to select a competent physician.

In the case of *Karabalis* v. *E. I. DuPont de Nemours & Co.*, 129 Va. 151 (Pet. Brief, p. 26), the Court merely sustained a count alleging that defendant took the decedent to a hospital and forcibly ejected him, causing his death, when it knew he was not fit to leave. The case had nothing to do with either the Federal Employers' Liability Act or the State Liability Act, as the Court held.

The Court was careful to point out however (p. 173) that if it appeared on the trial that the defendant exercised due care in the selection and retention of those in charge of the hospital there might be no liability on the defendant.

In the case of *Harris* v. *Pennsylvania Railroad Co.*, 50 Fed. (2nd) 866 (Pet. Brief, p. 13), the defendant was held liable for failure to rescue an employee who fell overboard from a car float and was drowned, and no question of maintenance or cure was involved. It clearly dealt with a case of accident, personal injury and negligence. The facts really fell within the line of some cases in which it was held that, at common law, the duty was imposed upon the Master, in case of sudden emergency, to take steps to save the life of the servant or save him from further grievous injury.

In *Atchison, T. & S. Fe Ry. Co.* v. *Hix,* Tex. Civ. App. 291 S. W. 281 (Pet. Brief, p. 27), plaintiff's intestate was knocked from the side of a box car, run over and his two legs almost severed from his body. The question of negligence of a fellow servant dealt with by the Federal Employers Liability Act was not involved in this case at all, but only the emergency treatment rule recognized by several state courts. Moreover, as the Court held there should be no recovery since there was no evidence to sustain a finding of negligence the statements in the opinion relied on can not really aid in the solution of the case at bar.

In *Northern Central Ry. Co.* v. *The State,* 29 Md. 420 (Pet. Brief, p. 23), the deceased was struck by defendant's train, rendered insensible and then, thought to be dead, was locked up by the Railway Co. in a warehouse over night, resulting in his death from hemorrhage. In this case there was no master and servant relation. The deceased was struck by a train while riding a horse across the defendant's right of way. The action was clearly for misfeasance.

In *Baker* v. *Adkins,* 278 S. W. 272 (Pet. Brief, p. 22), the Texas Court of Civil Appeals approved the doctrine

that a Railway Company was under a duty to care for an employee suddenly stricken by injury, but held that this duty terminated with the emergency. In this case the Railroad Co. prevented the deceased's wife from attending him when stricken with smallpox, but insisted on taking exclusive charge and placing him in a box car in the yard which was subject to frequent collisions. The finding in this case was based on the rule that, where the master insists on or assumes the care of an injured servant, he is bound to exercise reasonable care. Here also affirmative acts were done by the Master to the servant's detriment.

In *Carey* v. *Davis,* 190 Iowa 720 (Pet. Brief, p. 22), a farm laborer being overcome by the heat in a gravel pit, the Master removed him to a wagon box in the sun where he was in a more exposed condition, clearly an act of misfeasance. The Court held that, in the absence of contract, a master is under no legal duty to treat a sick or injured servant, but only to exercise reasonable care to relieve him in an emergency. The quotation from this case in petitioner's brief leaves out an important part of the proposition of law laid down by the Court. The whole quotation is as follows (p. 723):

> "It is unquestionably the well settled rule that in the absence of any agreement or contract therefor, the Master is under no legal duty to care for a sick or injured servant for whose illness or injury he is not at fault. Though, not unjust in principle, this rule if carried unflinchingly and without exception to its logical extreme, is sometimes productive of shocking results. To avoid this criticism, there is a tendency of the courts to hold that where, in the course of his employment, a servant suffers serious injury, or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm, the Master,

> if present, is in duty bound to take such reasonable measures or make such reasonable effort as may be practicable to relieve him, even though such master be not chargeable with fault in bringing about the emergency."

In *Troutman's Administratrix* v. *Louisville & Nashville Railroad Co.*, 179 Ky. 145 (Pet. Brief, p. 24), a track repairman was run over and his legs practically severed. His Administratrix brought suit, charging the Railroad Co. with negligence in failing to procure the services of a physician immediately. The action resulted *in the dismissal of the complaint* on the ground that the plaintiff failed to make out a case. The Court's statement of the law governing the case, however, clearly shows the limitation of the Common Law rule to emergency treatment (pp. 157, 158).

> "Coming now to apply what has been said to the case that we have, our opinion is that when an employe of a railroad company is injured while attempting to perform some service within the scope of his employment, whether his injuries are due to his own want of care or to the negligence of the railroad company, the company through its superior servants immediately in charge at the place where the accident occurs, such as the conductor in this instance, is under a duty to take such action as may be reasonably necessary and sufficient under all the surrounding circumstances to furnish the injured employe medical aid and attention suitable to the injury received, if there are no members of his family present who are capable of performing and do undertake to perform this service; and this duty exists although there may be no contract obligation requiring it or statute making it mandatory. We do not, however, undertake to lay down any rule as to the length of time this care and attention must

continue. It is sufficient here to say that the duty to observe it springs out of an emergency, and a variety of circumstances may control its duration."

The quotations from Benedict on Admiralty found in petitioner's brief on page 28 can best be understood by reading the whole sentence of which the quotation is only a part, from which it appears that the author was discussing only the question of admiralty jurisdiction and the only case cited thereunder, *Hughes* v. *Alaska S. S. Co.*, 287 Fed. 427, laid down the law contrary to that contended for by the author.

In the case of *Neil* v. *Flynn Lumber Co.*, 71 W. Va. 708 (Pet. Brief, p. 25), the servant had broken his leg and the defendant had contracted with him to furnish medical and surgical services. A physician was furnished to set the leg, but the treatment thereafter was performed by an incompetent layman furnished by the defendant, resulting in damage to the servant. The Court held that the relation of master and servant does not apply to the relationship between a corporation and a physician employed by it to care for its servants, and the rule of *respondeat superior* does not apply, but that the Master is only held to reasonable care in selecting a physician who shall have ordinary skill. It is true that the Court held that a demurrer to the complaint, on the ground that the action was in trespass on the case instead of *in assumpsit*, should have been overruled, but, as the action was really for misfeasance and as defendant neither appeared on the argument of the appeal nor filed any brief, and it was a question of local state practice, the action of the Court is easily understood.

This case is readily distinguishable from the case at bar for the reason that the complaint was based upon the unskillful treatment by a layman engaged by plaintiff's employer and not for non-feasance, viz., the failure to provide treatment.

In *Salla* v. *Hellman*, 7 Fed. (2d) 953 (S. D. Cal.) (referred to in Pet. Brief, p. 15), a libel of a seaman against a shipowner, the Court applied the Act of Congress of March 30, 1920, known as the Death on the High Seas Act. In the whole opinion no mention is even made of the Jones Act. If either Court or counsel believed that the Jones Act had any application it is unthinkable that it would not have been mentioned. The use of the word "negligence" in connection with the failure of the master to make any effort to rescue a seaman who had gone overboard, is of no importance as the Court was applying the Death on the High Seas Act which clearly permits recovery for a breach of obligations arising out of contract or tort.

In the cases cited in petitioner's brief, Part 2 of his Argument (pp. 29 to 34) all except possibly the English case of *Boorman* v. *Brown*, 3 Q. B. 511 (Pet. Brief, p. 29), contain elements of misfeasance or tortious acts, and consequently have no application here where the only charges on which any case could conceivably be made out were charges of non-feasance.

We might add that only two of the cases cited by the petitioner in Point I of its brief involved the Federal Employers Liability Act. These two cases are *Atchison, T. & S. F. Ry. Co.* v. *Hix, supra,* and *Troutman's Administratrix* v. *Louisville & Nashville Ry. Co., supra,* in both of which the complaints were dismissed.

Conclusion to Point I.

The contract right of a seaman to maintenance and cure, whether or not the condition requiring it was caused by the master's negligence, is so different from any right or duty of the servant or master on shore that common law

causes involving master and servant relations on land are of little real help in the solution of the question here. As we have seen, the cases hold that there is no general duty at common law owed by the master to the servant to furnish medical services but in some jurisdictions a limited duty to provide emergency relief and then only while the emergency lasts.

On the other hand, under the law of the sea, the obligation to furnish maintenance in addition to cure extends for a reasonable period after the seaman has left the ship and is on shore, *e. g.,* in the case of *Reed* v. *Canfield, (supra)*, where the obligation was extended to medical treatment and expenses of a seaman for more than a year after he had left the ship. When we consider that not only the cure but the maintenance of the seaman together with a lien therefor on the ship (*The Montezuma,* 19 Fed. 2nd, 355) are given under the law of the sea for such extended periods after the relationship ends and where the injury to the seaman was not connected with any negligence on the part of the vessel, it is easily understood why Congress did not intend, when the Jones Act was passed, to add to the shipowners' burdens by engrafting on the law of maintenance and cure a remedy for loss of life. The difficulties presented even to an intelligent and careful master at sea in the case of hidden ailments of his crew are another reason for leaving the law as it has stood for over a century.

Counsel submit that it has been shown that the cause of action for failure to provide cure has been considered a contractual action since the decisions of Judge Story over a hundred years ago. Prior to the passage of the *Jones Act* in 1920, no cause of action was given to a seaman arising out of negligence except in cases of unseaworthiness of the vessel. In cases brought after the *Jones Act,* no recovery has been granted under that Act for failure to provide cure, so far as counsel have been

able to ascertain, and this Court, in the opinions cited under this Point, has clearly intimated that, in its opinion, Congress did not intend in the *Jones Act* to interfere with the Maritime Law rules involving the doctrine of maintenance and cure.

The language of the *Jones Act* itself and the history of its passage indicate that Congress was endeavoring to change the Maritime Law by giving to seamen the rights then enjoyed by railroad employes in respect to accidents, namely in abolishing the fellow servant defense and in applying the common law rule of *respondeat superior*. Congress did not intend, in using the term "personal injury" to embrace cases involving the treatment of an illness and Congress did not intend, in using the word "negligence", to cover cases involving the breach of the implied contract to provide maintenance and cure.

The *Jones Act* has no application to the case at bar.

POINT II.

The reversal and dismissal of the complaint should be sustained as the proof failed to show that plaintiff's intestate's death was caused by respondents' negligence.

The charges of negligence in the complaint are six in number. For convenience in analysis they may be grouped as follows:

1. Negligence in the treatment of Santiago on the ship.

   a. Forecastle where Santiago was kept during his illness was dangerously cold and the heating apparatus was defective.

   b. Forecastle was filthy and unsanitary and bedding was insufficient, and not properly cared for.

c. Failure to keep Santiago in the hospital room.

d. Failure to furnish Santiago with proper and sufficient food.

2. Failure to obtain aid from passing vessels and failure to obtain prompt medical assistance after the vessel's arrival off Staten Island.

Assuming the specifications of negligent treatment on the ship to have been sustained there is no evidence to sustain a causal connection between any one or all of the conditions complained of and the death of Santiago or the aggravation of his illness.

a. *Charge of cold quarters and defective heating apparatus.*

The daily record of temperatures, taken on the bridge of the steamer and stipulated in evidence, of itself refutes the charge that the forecastle was "dangerously cold" (Defendant's Exhibit B, R. 177, 178). Santiago fell ill on the morning of October 17th and not until 4 P. M. on October 20th did the outside temperature fall below 70°. Thereafter until the ship reached port the temperatures taken varied from 78° high to 60° low. Plaintiff's only medical witness was Dr. Kienzle of the Staten Island Marine Hospital. He testified that a pneumonia patient "should be given all the fresh air possible, in fact, on my wards, I always have all windows down from the top, *even in severe cold weather.* * * * Even in damp rainy weather, a man should have plenty of fresh air" (R. 71). This fresh air treatment is, of course, confirmed by the testimony of Dr. Baldwin (R. 142).

In view of the foregoing it would seem unnecessary to go into the question of artificial heat in the forecastle. There is no testimony on the part of the plaintiff that the steam pipes in the forecastle were defective or that any witness asked for steam to be turned on during this voyage.

On the contrary, the testimony of the ship's officers is to the effect that the heating apparatus in the forecastle was in first class condition (R. 101) and that there was no request that steam be turned on (R. 119). Officers and crew agree that no steam was needed (Kounse, R. 127; Callis, R. 111; Thomas, R. 161; Deelande, R. 164; Escabi, R. 168). If the steam had been turned on, it would have been so hot that the crew would have to have left the forecastle (Escabi, water tender, R. 168; Kounse, R. 127).

b. *Charge that forecastle was filthy and unsanitary and that Santiago's bedding was insufficient and not properly cared for.*

A great part of the testimony on the trial is concerned with the presence of water in the forecastle. Plaintiff's witnesses did not agree upon its source, nor upon the frequency with which it was mopped up, but as they all agree upon its presence, it was an issue for the jury if there had been any testimony of causal connection. It would certainly not be assumed without proof that the presence of salt water on the floor of the forecastle would change the degree of dampness prevailing at sea. The only medical testimony on this point is that of Dr. Baldwin, who stated that the leakage of salt water on the floor would in his opinion have no effect upon the course of Santiago's disease (R. 138).

Santiago kept his clothing on during the voyage north, including his underwear, a shirt and pants (R. 20, 126). In addition, all plaintiff's witnesses agreed that he had one blanket, described by the witness Lopez as heavy (R. 12, 38). The witness Rosado stated that the bed clothes consisted of a blanket and two sheets (R. 83) and the ship's witnesses said that in addition there was a bedspread (R. 161, 164, 127). Assuming, however, that Santiago had only one blanket in addition to his clothes, with outside temperatures never lower than 60° it cannot be assumed in the

absence of proof that Santiago's condition was aggravated or his death caused by reason of insufficient bed clothes. It is true that Dr. Kienzle said he would recommend two blankets when the outside temperature was 60° (R. 78), but he does not state that the use of one blanket would be dangerous. In fact, the question and answer did not include as a fact that the patient had his clothes on in bed. Dr. Baldwin considered that one blanket under the circumstances was sufficient (R. 142). The steward, however, did furnish Santiago with an extra blanket which he did not use (Fielding, R. 157).

The testimony of Rosado concerning the soiling of Santiago's bunk and bed clothes is possibly true (R. 82). However, the bunk was changed the next day and he was given Rosado's blankets (R. 85), and in any event there is no attempt to connect up this incident with the aggravation of Santiago's illness—such aggravation cannot be inferred.

c. *Failure to keep Santiago in the hospital room of the ship.*

There is no testimony in the case that Santiago would have been more comfortable or better treated in the hospital room of the ship. Dr. Baldwin testified that it was, to a certain degree, carelessness not to put Santiago in the hospital room (Rec. 142), but again no attempt was made to show that such failure had any bearing upon Santiago's death. The captain stated that he kept the man in the forecastle as he saw nothing contagious about the man's illness, and he would get better treatment there than alone in the stern of the ship (R. 101).

d. *Failure to furnish Santiago with proper and sufficient food.*

Plaintiff's witnesses do not agree upon the question of food. The only one who stated that food was not served Santiago was Coto (R. 90), and his evidence on this

point was shown to be patently untrue or mistaken by the witnesses on both sides. This is the same witness who had water leaking into the forecastle from the deck above—a statement denied by plaintiff's other witnesses (R. 41). The witness Lopez stated that Santiago was given a little coffee or soup and bread, and Rosado saw the mess boy going forward with soup (R. 86). The ship's witnesses state that Santiago received soup or broth, and orange juice (R. 97, 125, 160, 161, 164). This diet is almost that prescribed by plaintiff's Dr. Kienzle (R. 66) and the omission of egg nogs alone can hardly be charged as actionable negligence, for the *Delisle* was registered under a prohibition flag. The charge of improper food was not substantiated.

2. *Failure to obtain aid from passing vessels and failure to obtain prompt medical assistance after the vessel's arrival off Staten Island.*

After sailing from Boca Grande, the *Delisle* proceeded around the Florida coast to Point Jupiter, which was reached about thirty-six hours after sailing, that is, in the early morning of October 18th (R. 114). The vessel's course was then out to sea following the Gulf Stream (R. 132). Santiago had then been ill about twenty-four hours, but the ship's officers had seen no alarming symptoms, and thought he was suffering from a grippy cold. The only testimony of the presence of passing vessels was that of plaintiff's witness Lopez. On cross examination he stated that the only vessels he saw were on the Florida coast (R. 27). The value to Santiago of a transfer to another vessel is a matter of doubt at best, and might have aggravated matters. At any rate there is no evidence that such a transfer would have prevented his death.

There remains the charge of failure to summon medical aid upon arrival at New York Harbor, Sunday night, October 21st. The master and other officers never appreciated

the fact that Santiago was suffering from pneumonia. It is not surprising that this did not occur to them when consideration is given to the fact that the man became ill in Florida with the thermometer averaging 80 degrees. Mariners associate pneumonia with cold weather and as a result of exposure to cold. It was quite logical for these officers to diagnose the case as a cold or fever of some sort and to treat it accordingly. Plaintiff's Dr. Kienzle stated on direct examination that the symptoms described might indicate a number of diseased conditions, not particularly pneumonia, *even to a doctor* (R. 63). The master thought he had grippe (R. 97) as did also the third officer Kounse, who had taken upon himself the care of Santiago (R. 124), probably because he had received U. S. Navy first aid training (R. 123). The treatment prescribed and given by Kounse was quinine, laxatives and a light diet (R. 124, 125).

The fever, which had originally been as high as 104° for several days before arrival, stood at 103°. Both the master and Kounse saw the man walking on deck on October 21st and thought he was getting better (R. 99, 125). If the Court should hold, however, that the officers' failure to appreciate the nature of the disease and its dangers is immaterial, the question of causation again arises. It is on this phase of the case alone that any medical testimony of causation was adduced. Dr. Kienzle testified that if Santiago had been given proper medical care, he would have had "a chance of 88 out of 100 of surviving" (R. 80). The medical care referred to by Dr. Kienzle is modern hospital treatment, namely, the use of serum, alcohol baths, special diet and purgatives. Dr. Kienzle admitted that his prognosis of recovery was based upon the patient entering a hospital within 24 hours after he became ill (R. 80), obviously impossible in this case. He further testified that mortality is in proportion to the time the patient reaches the hospital and that the

12% mortality experience was "based on patients received early at our institutions and able to take the pneumonia serum" (R. 55).

Dr. Kienzle's testimony established that the *type* of pneumonia in this case was the type caused by the Friedlander bacillus (R. 54). Dr. Kienzle, at the time he saw Santiago, had been admitted to the practice of medicine in New York only two months and in Kentucky only three years. His knowledge of pneumonia was not very thorough as indicated by his admission of error (R. 55) and his subsequent description of the pneumonia germ, "It is a pneumococcus organism—it is hard to remember all this pathological stuff, I guess you had better strike out bacillus all through—it is pneumococcus, a coccus type of bacillus which causes a typical growth on the blood agar".

However, Dr. Kienzle did know that there were various types of pneumonia (R. 70) and he refers to "this particular type in this case". As Friedlander was the only type mentioned, it is fair to assume that this was a *Friedlander bacillus* case. The inference from Dr. Kienzle's testimony is confirmed by Dr. Baldwin's statement that the spitting up of blood is a striking characteristic of the *Friedlander bacillus* pneumonia (R. 136). Dr. Baldwin is a pneumonia specialist, in charge of pneumonia cases at New York Hospital (R. 134).

Dr. Kienzle apparently did not know that serum treatment is never given in Friedlander bacillus cases. The testimony of Drs. Baldwin and Cornell on this point is so specific that it must be considered as established (R. 135, 151). This unfamiliarity with the distinction between types of pneumonia is most important in connection with the testimony on probable mortality. Drs. Cornell and Baldwin testified that mortality in *Friedlander* type cases runs from 70% to 90% as compared with an average mortality in other types of about 33% in hospital practice (R. 135, 151). In view of Dr. Baldwin's experience as a spe-

cialist in the disease, the corroboration of his testimony by Dr. Cornell and the evident gaps in Dr. Kienzle's scientific knowledge of the subject, it must be considered established that the Friedlander type of pneumonia is usually fatal and that Santiago was doomed by reason of the nature of his illness rather than by failure to receive medical treatment (R. 149).

By the weight of the medical testimony at bar, Santiago's chances of recovery with the best of treatment were slight. It was error to permit the jury to speculate as to whether his death was caused by the infection itself or by failure to provide hospital treatment.

In *Chicago M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, this Court held that upon review of a judgment of a state court in a case under the Federal Employers' Liability Act, this Court would examine the record and if it was found that as a matter of law the evidence was not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier would be reversed. After considering the evidence this Court found that it lent no substantial support to the contention that the death of plaintiff's intestate, a brakeman who was run over by a car in a train, which was in process of being made up and coupled, was caused or contributed to by a pipe near the rail, which the railroad company had negligently permitted to remain in a bent condition (p. 472), saying at page 478:

> "When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pawling* v. *United States,* 4 Cr. 219,

221; *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 663; *Looney* v. *Metropolitan Railroad Co.*, 200 U. S. 480, 488; *St. L. & Iron Mtn. Ry. Co.* v. *McWhirter, supra*, 282; *St. Louis-San Francisco Ry.* v. *Mills, ante*, p. 344."

In *Patton* v. *Texas and Pacific Railway Company*, 179 U. S. 658, plaintiff, a fireman, sued for injuries alleged to have been received by the turning of a step as he descended from his engine. This Court held that there was not sufficient proof as to how the nut securing the step was loosened and that it might have been loosened by causes other than the defendant's negligence, saying at page 663:

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In *Johns-Manville* v. *Pocker*, 26-Fed. (2d) 204 (C. C. A., 8), an employee sued for injuries sustained when the end of a wire which he cut recoiled and struck his eye. The Court held that for plaintiff to recover there must be shown causal connection between breach of duty and injury; that it must be further shown that like injury due to alleged negligence could have been anticipated by a reasonably prudent person, and that although the question of proximate cause is ordinarily one for the jury, where there is no substantial evidence in the record on which to base a finding in favor of the plaintiff the Court should instruct for defendant. In this cause a judgment for the plaintiff was reversed because there were no sufficient proofs in the record to sustain it.

In *Collins* v. *District of Columbia*, 48 Fed. (2d) 1012 (Court of Appeals, D. of Col.), the Court held that the burden of proof was on a passenger in an automobile which plunged through a bridge railing to establish by preponderance of evidence that the accident was caused by the negligence of the traction company or the District of Columbia in leaving a bank of snow toward the curb of the bridge; saying (p. 1014):

> "The burden of proof at the trial was upon the plaintiff, in order to recover against either defendant, to establish by the preponderance of the evidence that the accident was in fact caused by the negligent act or omission of such defendant. The causal connection between the accident and the negligence of the defendant must not be left to mere conjecture or supposition. There is a complete failure of proof in the present record upon this vital point, and this fact defeats appellant's appeal in this court."

In *Ketterer* v. *Armour & Co.*, 247 Fed. 921, the plaintiff contracted trichinitis after eating a pork product manufactured by the defendant and claimed damages for negligence in inspection. In holding that the lower court properly dismissed the complaint, the court said (p. 931):

> "And as there might have been a number of microscopical inspections made without discovering the trichinae, which might still have been present and caused the very injury of which complaint is made, the failure to make tests cannot be held to be the direct and proximate cause of the injury complained of, and without which it would not have occurred. There is no liability for a negligent act unless the negligent act is the proximate cause of the injury. And to establish proximate cause it is necessary that there be a causal connection between the negligent

act and the injury. The act must have been such that without it the injury would not have happened. 29 Cyc. 489."

In the case of *Ford* v. *McAdoo,* 231 N. Y. 155, the death of a railroad brakeman was involved and the question was whether the deceased merely fell from the train or was pulled off by reason of an alleged defective hook. The Court, in reversing a judgment for the plaintiff below, said:

> "When inferences are thus clearly consistent, the one with liability and the other with no cause of action, the plaintiff has not met the burden which the law places upon her."

In *White* v. *Lehigh Valley R. R. Co.,* 220 N. Y. 31, involving the death of a railroad worker, the question was whether defects on a car's roof had a causal connection with the accident. The Court stated in its opinion:

> "If the facts are as consistent with the appellant's theory as with the respondent's, the plaintiff should have been nonsuited. It was not sufficient for the plaintiff to show that a defect might have caused the fall and death, if the circumstances indicate an equal probability that they were due to some other cause. The plaintiff was bound to make out her case by the preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the fall was caused in consequence of the negligence of the defendant is not sufficient. When the precise cause of an accident is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then the plaintiff is not entitled to recover, and the evidence should not be submitted to the jury."

Applying the law of these cases it is apparent that error was committed below in permitting the jury to speculate upon the cause of Santiago's death. The answer to the one

hypothetical question which injects any causation whatever into the case shows the conjectural element involved. Dr. Kienzle was asked if he could state with reasonable certainty whether Santiago would have survived if he had been given proper medical treatment. He said (R. 80):

> "I can state that with my experience he would have *a possible chance* of 88 out of 100 of surviving." (Italics ours.)

Upon the testimony of Drs. Baldwin and Cornell this possible chance is diminished to from one to three out of ten. In any event, the verdict declaring defendant liable for Santiago's death was a result of sheer guess work on the part of the jury. There was nothing in the evidence to *prove* causation and the complaint should have been dismissed or a verdict directed for the defendant.

POINT III.

In no event can the judgment of the District Court be reinstated without modification, as there was error in including therein interest on the verdict from the date of death.

As no action for death existed at common law or under maritime law, the judgment herein must be considered to have been entered upon a death statute. No statute was pleaded and the only one that could be considered without being pleaded is the *Jones Act,* which has been held to have become a part of the maritime law.

Under the Jones Act, interest upon a verdict from death is not recoverable. In neither the *Jones Act* nor the Federal Employers' Liability Act is there any provision for such interest upon a verdict.

Murmann v. *New York, New Haven & Hartford R. R. Co.,* 258 N. Y. 447;

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1932.

Rafael Cortes, as Administrator of the Goods, Chattels and Credits of Victor Manuel Santiago, Deceased, Petitioner,
vs.
Baltimore Insular Line, Inc., Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

[December 5, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

Santiago, a seaman, shipped on the respondent's vessel for a voyage from the harbor of New York to Boca Grande, Florida, and return. On the home voyage, he fell ill of pneumonia, and died in a hospital after reaching the home port. His administrator, the petitioner, sued to recover damages for his death, which was charged to have been caused by the failure of the master of the ship to give him proper care. In the District Court there was a judgment for the petitioner which was reversed upon appeal. The reversal was on the ground that the seaman's right of action for negligent care or cure was ended by his death, and did not accrue to the administrator for the use of next of kin. 52 F. (2d) 22. The case is here on certiorari.

By the general maritime law a seaman is without a remedy against the ship or her owners for injuries to his person, suffered in the line of service, with two exceptions only. A remedy is his if the injury has been suffered as a consequence of the unseaworthiness of the ship or a defect in her equipment. *The Osceola,* 189 U. S. 158; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Pacific Co.* v. *Peterson,* 278 U. S. 130, 134. A remedy is his also if the injury has been suffered through breach of the duty to provide him with "maintenance and cure." The duty to

make such provision is imposed by the law itself as one annexed to the employment. *The Osceola, supra.* Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. *The Iroquois,* 194 U. S. 240. On the other hand, the remedy for the injury ends with his death in the absence of a statute continuing it or giving it to another for the use of wife or kin. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240; *Lindgren* v. *United States,* 281 U. S. 38, 47. Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land.

The question then is to what extent the ancient rule has been changed by modern statute. Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act* (41 Stat. 1007, § 33; 46 U. S. Code, § 688), gives a cause of action to the seaman who has suffered personal injury through the negligence of his employer. For death resulting from such injury it gives a cause of action to his personal representative. We are to determine whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of the statute.

The argument is pressed upon us that the care owing to a seaman disabled while in service is an implied term of his contract, and that the statute cannot have had in view the breach of a duty

*"That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

Compare the act of March 30, 1920, c. 111, § 1, 41 Stat. 537, 46 U. S. Code, § 761, "Death on the High Seas by Wrongful Act," which extends to persons other than seamen, but is limited to suits in admiralty.

contractual in origin for which he had already a sufficient remedy under existing rules of law.

We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort. The passenger in a public conveyance who has been injured by the negligence of the carrier, may sue for breach of contract if he will, but also at his election in trespass on the case. *Jackson* v. *Old Colony Street Ry.*, 206 Mass. 477, 485; *Busch* v. *Interborough R. T. Co.*, 187 N. Y. 388, 391; *Rich* v. *N. Y. C. & H. Riv. Railroad Co.*, 87 N. Y. 382, 390; *Neil* v. *Flynn Lumber Co.*, 71 W. Va. 708; cf. the cases cited in Pollock on Torts (13th Ed.), p. 557 *et seq.* The employee of an interstate carrier injured through the omission to furnish him with safe and suitable appliances may have a remedy under the Federal Employers' Liability Act (45 U. S. Code § 51), or at times under the Safety Appliance Act (45 U. S. Code, §§ 1 to 6), though the omission would not be actionable in the absence of a contract creating the employment. So, in the case at hand, the proper subject of inquiry is not the quality of the relation that gives birth to the duty, but the quality of the duty that is born of the relation. If the wrong is of such a nature as to bring it by fair intendment within the category of a "personal injury" that has been caused by the "negligence" of the master, it is not put beyond the statute because it may appropriately be placed in another category also.

We are thus brought to the inquiry whether "negligence" and "personal injury" are terms fittingly applied to the acts charged to the respondent. The case is helped by illustrations. Let us suppose the case of a seaman who is starved during the voyage in disregard of the duty of maintenance with the result that his health is permanently impaired. There is little doubt that in the common speech of men he would be said to have suffered a personal injury, just as much as a child in an orphan's home who had been wronged in the same way. Cf. *Queen* v. *Instan*, [1895] 1 Q. B. 450. Let us suppose the case of a seaman slightly wounded

through his own fault, but suffering grievous hurt thereafter as a consequence of septic poisoning brought about by lack of treatment. The common speech of men would give a like description to the wrong that he had suffered. The failure to provide maintenance or cure may be a personal injury or something else according to the consequences. If the seaman has been able to procure his maintenance and cure out of his own or his friends' money, his remedy is for the outlay, but personal injury there is none. If the default of the vessel and its officers has impaired his bodily or mental health, the damage to mind or body is none the less a personal injury because he may be free at his election to plead it in a different count. Cf. *Pacific Co.* v. *Peterson, supra,* pp. 137, 138. Nor is liability escaped by appeal to the distinction between acts of omission on the one hand and those of commission on the other. *Moch Co.* v. *Rensselaer Water Co.,* 247 N. Y. 160, 167, 168. A division is sometimes drawn between the termination of a relation at a time when it is still executory or future, and its termination when performance has gone forward to such a point that abandonment of duty becomes an active agency of harm. *Moch Co.* v. *Rensselaer Co., supra.* The respondent is not helped though its treatment of the seaman be subjected to that test. Here performance was begun when the vessel started on her voyage with Santiago aboard and with care and cure cut off from him unless furnished by officers or crew. From that time forth withdrawal was impossible and abandonment a tort. Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfilment of the duty thus recognized by law. *Moch Co.* v. *Rensselaer Water Co., supra,* citing Pollock on Torts, (13th ed.), p. 567; *Kelley* v. *Met. Ry. Co.,* [1895] 1 Q. B. 944.

We are told, however, that the personal injury from negligence covered by the statute must be given a narrow content, excluding starvation and malpractice, because for starvation and malpractice the seaman without an enabling act had a sufficient remedy before. The seaman may indeed have had such a remedy, but his personal representative had none if the wrong resulted in his death. While the seaman was still alive, his cause of action for personal injury created by the statute may have overlapped his cause of action for breach of the maritime duty of maintenance and cure, just as it

may have overlapped his cause of action for injury caused through an unseaworthy ship. *Pacific Co.* v. *Peterson, supra,* p. 138; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321, 324. In such circumstances it was his privilege, in so far as the causes of action covered the same ground, to sue indifferently on any one of them. The overlapping is no reason for denying to the words of the statute the breadth of meaning and operation that would normally belong to them, at all events when a consequence of the denial is to withhold any remedy whatever from dependent next of kin. A double remedy during life is not without a rational office if the effect of the duplication is to carry the remedy forward for others after death. The argument for the respondent imputes to the lawmakers a subtlety of discrimination which they would probably disclaim. There was to be a remedy for the personal representative if the seaman was killed by the negligent omission to place a cover over a hatchway or to keep the rigging safe and sound. There was to be none, we are told, if he was killed for lack of food or medicine, though the one duty equally with the other was attached by law to the relation. This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings. *Jamison* v. *Encarnacion,* 281 U. S. 635. An assault by one member of the crew upon another with a view to hurrying up the work has been brought within the category of "negligence," and hence in a suit against the owner becomes an actionable wrong. *Jamison* v. *Encarnacion, supra; Alpha S. S. Co.* v. *Cain,* 281 U. S. 642. Approaching the decision of this case in a like spirit of liberality, we put aside many of the refinements of construction that a different spirit might approve. The failure to furnish cure is a personal injury actionable at the suit of the seaman during life, and at the suit of his personal representative now that he is dead. Cf. *U. S. Shipping Board Emergency Fleet Corp.* v. *Greenwald,* 16 F. (2d) 949.

We are warned, however, that in giving this content to the statute we are omitting to give heed to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted. The Employers' Liability Act for the protection of the employees of common carriers by railroad gives a remedy to such employees "for injury or death resulting in whole or in part from the

negligence of any of the officers, agents or employees of such carrier," or by reason of any negligent defect in its roadbed or equipment. 35 Stat. 65, § 1; 45 U. S. Code, § 51. True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance or cure to sick or disabled employees. We say except in special circumstances, for it would be hazardous to assert that such a duty may not rest upon the representative of a railroad as well as upon the master of a ship when the servant, exposed by the conditions of the work to extraordinary risks, is helpless altogether unless relief is given on the spot. *Ohio & Mississippi Ry. Co.* v. *Early*, 141 Ind. 73, 81; *Shaw* v. *Chicago, M. & St. P. R. R. Co.*, 103 Minn. 8; *Raasch* v. *Elite Laundry Co.*, 98 Minn. 357; *Hunicke* v. *Meramec Quarry Co.*, 262 Mo. 560, 581, 597.* The result, however, will not be different though we assume that the servant of a railroad company, if he has been injured without fault, may never call for help as due to him of right, however pressing the emergency and imperative the need. We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that "the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." *Robertson* v. *Baldwin*, 165 U. S. 275, 287. Another court has said: "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited." *Scarff* v. *Metcalf*, 107 N. Y. 211, 215. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection. There is doubt, and that substantial, whether the administrator of a railroad engineer who by misadventure has fallen from his locomotive while the train is on a bridge has a cause of action under the Federal Employers' Liability Act because of the failure

*The authorities are brought together and carefully discriminated by Prof. Francis H. Bohlen, in an article "Moral Duty to Aid Others as Basis of Tort Liability," in 56 University of Penn. Law Review 217, 316, reprinted in his "Studies in the Law of Torts," pp. 290, 315.

of the crew of the train to come to the rescue of their comrade. *Harris* v. *Penn. R. R. Co.*, 50 F. (2d) 866, 868.* There is little doubt that rescue is a duty when a sailor falls into the sea, *United States* v. *Knowles*, 4 Sawy. 517, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. *Harris* v. *Penn. R. R. Co., supra.*

The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs. Cf. *Murray* v. *Chicago & N. W. Ry. Co.*, 62 Fed. 24, 31; *Ward* v. *Erie R. R. Co*, 230 N. Y. 230, 234; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 343. Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i. e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail.

The Court of Appeals in its reversal of the District Court assumed without deciding that the care of the seaman had been negligent and that there was a causal relation between the negligence and the death. The correctness of that assumption is challenged by counsel for the shipowner. These issues of fact being still open and undecided should be disposed of by the court below.

The judgment is reversed and the cause remanded to the Court of Appeals for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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*Compare again the authorities collected by Bohlen in his "Studies in the Law of Torts," p. 312.